# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1962

## No. 593

GENE DURFEE, ET UX., PETITIONERS,

*vs.*

JULIA E. DUKE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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**IN THE UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF MISSOURI**
**ST. JOSEPH DIVISION**

Case No. 1027

---

JULIA E. DUKE, Plaintiff,

vs.

GENE DURFEE and LAURA DURFEE, husband and wife, RALPH KEIFFER, RUSSELL NAUMAN, FIRST STATE BANK, Forest City, Missouri, a corporation, and JAMES H. PETTIJOHN, Trustee, Defendants.

---

PETITION FOR REMOVAL—Filed June 9, 1959

Petitioners, Gene Durfee and Laura Durfee, respectfully show unto the Court as follows:

1) Petitioners, Gene Durfee and Laura Durfee, are a part of the defendants in the above entitled action; that the other defendants, namely, Ralph Keiffer, Russell Nauman, First State Bank, Forest City, Missouri, a Corporation, and James H. Pettijohn, Trustee are not indispensable defendants and are merely nominal or formal defendants, and are in a separable controversy.

2) The above entitled action was commenced in the Circuit Court for the County of Holt, State of Missouri, and is now pending in that Court. Process was served on the petitioners on the 25th day of May, 1959. A copy of the plaintiff's petition setting forth the claim for relief upon which the action is based was first received by the petitioners on the 25th day of May, 1959.

3) The action is a civil action to determine the estate, [fol. 2] title and interest of the parties in certain real estate described therein and the United States District Court for

the Western District of Missouri, St. Joseph Division has jurisdiction by reason of the diversity of citizenship of the parties as your petitioners are citizens of Falls City, Holt County, Nebraska, and the plaintiff, Julia E. Duke is a citizen of St. Joseph, Buchanan County, Missouri.

4) The matter in controversy exceeds, exclusive of costs and disbursements, the sum of $10,000.00. No change of citizenship of parties has occurred since the commencement of the action.

5) This petition is accompanied by a bond conditioned as required by law.

6) Copies of all process, pleadings and orders served upon petitioners are filed herewith.

Wherefore, your petitioners pray that this action be removed.

Dated this 9th day of June, 1959.

Theodore M. Kranitz, Kranitz and Kranitz, 714 Francis Street, St. Joseph, Missouri, Telephone: 2-4409;

August Ross, City National Bank Bldg., Omaha, Nebraska, Telephone AT 3525;

Alfred A. Fiedler, 600 Keeline Building, Omaha 2, Nebraska, Telephone: AT 3525;

Attorneys for Petitioners and Defendants Gene Durfee and Laura Durfee.

[fol. 3] *Duly sworn to by Gene Durfee and Laura Durfee, jurat omitted in printing.*

[fol. 9]

IN THE CIRCUIT COURT OF HOLT COUNTY, MISSOURI

Case #2951

JULIA E. DUKE, Plaintiff,

vs.

GENE DURFEE and LAURA DURFEE, husband and wife, RALPH KEIFFER, RUSSELL NAUMAN, FIRST STATE BANK, Forest City, Missouri, a corporation, and JAMES H. PETTIJOHN, Trustee, Defendants.

PETITION

I

Plaintiff, for her cause of action, states that she is the owner in fee simple of, and in possession of the following described real estate, lying, being and situate in the County of Holt, and State of Missouri, to-wit:*

* * * * * *

[fol. 11]

II

Plaintiff further states that the Defendants, Gene Durfee and Laura Durfee, husband and wife, claim some interest in and to said real estate, the nature and character of which is unknown to Plaintiff and cannot be described herein except that said claim is adverse and prejudicial to this Plaintiff.

III

Plaintiff further states that the Defendants, Ralph Keiffer and Russell Nauman, are in possession of a part of said real estate as the tenants of Plaintiff and that their only interest in and to said real estate is as tenants of Plaintiff.

IV

Plaintiff further states that the Defendant, First State Bank of Forest City, Missouri, is, and was at all the times

* (Clerk's Note: Counsel have agreed that a complete description of the land in controversy may be omitted.)

mentioned herein a banking corporation duly organized and existing under and by virtue of the laws of the State of Missouri and with its principal place of business in the City of Forest City, Holt County, Missouri; that the only interest of the Defendant, First State Bank, Forest City, Missouri, is as beneficiary under a deed of trust dated the 21st day of November, 1956, of record in the office of the Recorder of Deeds within and for Holt County, Missouri, in Book 215, at page 134, wherein the real estate hereinabove described was conveyed to James H. Pettijohn, as Trustee, to secure to the Defendant, First State Bank, Forest City, Missouri, the payment of a certain promissory note for the sum of $10,000 in said deed described, the said James H. Pettijohn taking the legal title thereto, as trustee, with the bank to sell the same for the payment of said note; and that the interest of the Defendant, James H. Pettijohn, in and to the real estate hereinabove described is as Trustee under said Deed of Trust.

V

Wherefore, the premises considered, Plaintiff prays the Court to try, ascertain and determine the estate, title and interest of the parties, Plaintiff and Defendants, herein, severally in and to the above described real estate, and to define and adjudge by its judgment and decree that the Plaintiff is the fee simple owner of in and to said real estate; and that the Defendants, Gene Durfee and Laura Durfee, husband and wife, nor either of them, or anyone for them or in their behalf, have any right, title or interest in and to said real estate; and that they be forever enjoined and restrained from asserting, claiming, or setting up any right, title or interest in and to said real estate; and for her costs in this behalf expended.

[fol. 12] Wiltse & Wiltse, By John Wiltse, 1622 Stone Street, Falls City, Nebraska, Telephone Number 3919;

Pettijohn & Eiser, By J. R. Eiser, Oregon, Missouri, Telephone Number 45,

Attorneys for Plaintiff.

[fol. 13] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI

ST. JOSEPH DIVISION

Civil No. 1027

[Title omitted]

NOTICE OF REMOVAL—Filed June 9, 1959

To: Wiltse and Wiltse, 1622 Stone Street, Falls City, Nebraska; Pettijohn and Eiser, Oregon, Missouri, Attorneys for the Plaintiff in the above entitled cause: Ralph Keiffer, Russell Nauman, First State Bank, Forest City, Missouri, a Corporation, and James H. Pettijohn, Trustee.

Please take notice that defendants, Gene Durfee and Laura Durfee, husband and wife, on June 9, 1959, filed in the United States District Court for the Western District of Missouri, St. Joseph Division, a petition and bond for the removal of the above entitled cause from the Circuit Court for the County of Holt, State of Missouri, case Number 2951, copies of said petition and bond are hereto attached.

Dated this 9 day of June, 1959.

Theodore M. Kranitz, Kranitz and Kranitz, 714 Francis Street, St. Joseph, Missouri, Telephone: 2-4409;

August Ross, City National Bank Bldg., Omaha 2, Nebraska, Telephone: AT 3525;

Alfred A. Fiedler, 600 Keeline Building, Omaha 2, Nebraska, Telephone: AT 5311,

Attorneys for Petitioners and Defendants Gene Durfee and Laura Durfee.

[fol. 42] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI

ST. JOSEPH, MISSOURI

Civil Action No. 1027

[Title omitted]

ALTERNATIVE MOTION TO DISMISS OR FOR SUMMARY JUDGMENT; AND ANSWER OF DEFENDANTS GENE DURFEE AND LAURA DURFEE—Filed June 15, 1959

Alternative Motion to Dismiss or for Summary Judgment

Come now defendants Gene Durfee and Laura Durfee, husband and wife, and move the court alternatively to dismiss the petition of plaintiff as against Ralph Keiffer, and Russell Nauman, or to grant summary judgment for said defendants under Rule 56, on the ground that the petition of plaintiff states no cause of action against said defendants, for the reason that it is alleged in the petition of plaintiff, in paragraph 3 thereof, that said defendants Keiffer and Nauman have no such right, title, or interest in and to the real property which is the subject of this cause of action, as to make them proper parties hereto.

Whereof, defendants Durfee pray the judgment of the court.

[fol. 43] Answer

Come now defendants Gene Durfee and Laura Durfee, husband and wife, and for answer to the petition of plaintiff allege and state:

I

That they deny each and every allegation contained in paragraph 1 of the petition of plaintiff.

II

Affirmative Defense—Res Judicata: That on or about the 11th day of November 1956 these defendants Durfee instituted an action in the District Court of Richardson County, Nebraska, a court of general jurisdiction, wherein plaintiff Julia E. Duke was duly named and served as a party defendant, the general nature and object of said cause of action being to try, determine, and quiet the title to the real estate mentioned in paragraph I of the petition of plaintiff Duke herein; that said Julia E. Duke duly appeared, answered said petition of these defendants in the said District Court of Richardson County, Nebraska, and, on trial on or about the 27th and 28th days of May 1958, asserted title to said real estate mentioned in paragraph I of her petition in this cause of action by reason of a Missouri Swamp Land Patent then and there introduced in evidence; that on or about the 2d day of August 1958 the said District Court of Richardson County, Nebraska, made and entered its findings and decree in favor of these defendants (plaintiffs in that cause of action); that thereafter, in due course, plaintiff prosecuted her appeal to the Supreme Court of the State of Nebraska; that the said Supreme Court of the State of Nebraska, on or about the 27th day of March 1959 affirmed the decree of the District Court of Richardson County, Nebraska, and quieted and confirmed title to said property in defen-
[fol. 44] dants Durfee and against the claims of plaintiff Duke; that on or about the 5th day of June 1959, the mandate of said Supreme Court of the State of Nebraska to the District Court of Richardson County, Nebraska, affirming said decree was entered of record.

That by reason of all of the foregoing, the claim of plaintiff set forth in her petition has been previously adjudicated and determined, and that the real property described in the decree entered in the District Court of Richardson County, Nebraska, is identically the same real estate described in the Missouri Swamp Land Patent of Julia E. Duke (Exhibit 12 in said Nebraska action; Exhibit D attached hereto), and in paragraph I of plaintiff's petition herein.

III

That the following exhibits are attached to the Court's copy hereof and made a part hereof by reference the same as though set out at length herein:

Exhibit A—Petition in the District Court of Richardson County, Nebraska, Gene Durfee, plaintiff, v Julia E. Duke et al, defendants, Case No. 12120.

Exhibit B—Amended petition in same cause (Laura Durfee was added as a party plaintiff, by leave of Court, during trial of the cause).

Exhibit C—Answer of defendant Julia E. Duke to the petition set out as Exhibit A.

Exhibit D—Missouri Swamp Land Patent.

Exhibit E—Decree of the District Court of Richardson County, Nebraska.

Exhibit F—Opinion of the Supreme Court of Nebraska, same case on appeal, No. 34522.

Exhibit G—Mandate of the Supreme Court of Nebraska.

IV

That these defendants deny each and every allegation of [fol. 45] plaintiff's petition not specifically admitted herein.

Wherefore, having fully answered, these defendants pray that they be discharged, and that they go hence with their costs.

Kranitz & Kranitz, 714 Francis Street, St. Joseph, Missouri, Telephone ADams 2-4409;

August Ross, City National Bank Bldg., Omaha, Nebraska, Telephone ATlantic 3525;

Alfred A. Fiedler, 600 Keeline Building, Omaha 2, Nebraska, Telephone ATlantic 5311;

By Theodore M. Kranitz, Attorneys for Defendants Durfee.

[fol. 50]

EXHIBIT "B" TO ALTERNATIVE MOTION AND ANSWER

IN THE DISTRICT COURT OF RICHARDSON COUNTY
NEBRASKA

#12120

Doc. 28 No. 96

FILED
May 17 1957
Fred C. Zorn

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GENE DURFEE,

Plaintiff,

vs.

RALPH KEIFFER, if married, ..... KEIFFER, his wife, first, real and true name unknown; RUSSELL NAUMAN, if married, ..... NAUMAN, his wife, first, real and true name unknown; JOHN DOE and JANE DOE, husband and wife, real names unknown; NELLIE N. DUKE, if married, ..... DUKE, her husband, first, real and true name unknown; JULIA E. DUKE, if married, ..... DUKE, her husband, first, real and true name unknown; all persons having or claiming any right, title or interest in or to all of that part of Sections Seventeen (17), Twenty (20), Twenty-one (21), Twenty-two (22), and Twenty-three (23), Township 1 North, Range 18 East of the 6th P.M. in Richardson County, Nebraska, bounded on the north and east by the survey line of 1855-56 as established by the Surveyor General's Office of the United States, being the then meander line of the middle of the channel of the Missouri River, and bounded on the west and south by the present meander line of the said Missouri River, real names unknown,

Defendants.

---

AMENDED PETITION

COMES Now plaintiff and for cause of action against the defendants, and each of them, alleges:

I.

That plaintiff is the owner in fee simple of the following described real estate, to-wit:

All of that part of Sections Seventeen (17), Twenty (20), Twenty-one (21), Twenty-two (22), and Twenty-three (23), Township 1 North, Range 18 East of the 6th P.M. in Richardson County, Nebraska, bounded on the north and east by the survey line of 1855-56 as established by the Surveyor General's Office of the United States, being the then meander line of the Middle of the channel of the Missouri River, and bounded on the west and south by the present meander line of the said Missouri River.

II.

Plaintiff further alleges that said described real estate is wholly within the State of Nebraska; that said property [fol. 51] lies immediately west of the old survey line of 1855-56, which survey line was the meander line of the middle of the channel of the Missouri River; that said survey was conducted under the supervision and direction of the Surveyor General's Office, P. W. Hitchcock, Surveyor General, under the Department of Interior of the United States Government; that said survey line of 1855-56 is the true boundary line between the states of Nebraska and Missouri; that the meander line of the middle of the channel of the Missouri River was the established east boundary of the State of Nebraska upon its admission to the Union; that the meander line of the said river at the time the State of Nebraska was admitted to the Union, March 1, 1867, was the same as established by the survey of 1855-56; that so much of said survey as constitutes the boundary of the real estate referred to herein is attached hereto, marked Exhibit "A" and by reference made a part hereof; that the Missouri River which formed the boundary between the said states changed its course to its present course as the result of avulsions which occurred in the year 1916, and that the boundary between said states remains as it existed at the time of said survey.

That Exhibit "A", attached to petition herein, is from the official records of the County Surveyor of Richardson County, and that said survey of 1855-56 is recorded in said County at Plat Book 1, Page 23.

III.

The plaintiff is reliably informed that the defendants Ralph Keiffer and Russell Nauman and John Doe and Jane Doe, husband and wife, real names unknown, are in possession of part of the hereinabove described real estate; that plaintiff does not know what interest, if any, said defendants may have or claim in and to said described real estate; that whatever interest said defendants may have or claim in and to said described property, the same is junior and inferior to plaintiff's title thereto.

IV.

That the defendants Nellie N. Duke, if married, ..... Duke, her husband, first, real and true name unknown; Julia E. Duke, if married, ..... Duke, her husband, first, [fol. 52] real and true name unknown; have or appear to have or claim some right, title or interest in and to said described real estate; that whatever interest said defendants may have or claim, the same is junior and inferior to plaintiff's title thereto.

V.

Plaintiff further alleges that after diligent search, investigation and inquiry, he has been unable to ascertain and does not know the whereabouts, if in this State, the residence of or place of abode of the following named defendants, to-wit: Ralph Keiffer, if married, ..... Keiffer, his wife, first, real and true name unknown; Russell Nauman, if married, ..... Nauman, his wife, first, real and true name unknown; John Doe and Jane Doe, husband and wife, real names unknown; Nellie N. Duke, if married, ..... Duke, her husband, first, real and true name unknown; Julia E. Duke, if married, ..... Duke, her husband, first, real and true name unknown.

VI.

Plaintiff further alleges that there are persons who have or appear to have some right, title or interest in or to such property, and that the ownership, interest in, right or title to, or lien upon such property of such persons does not appear of record in or by their respective names in Richardson County, Nebraska, and that plaintiff after diligent investigation and inquiry is unable to ascertain and does not know the names or whereabouts, if in this State, or the residence of such persons, who have been designated as defendants herein as "all persons having or claiming any right, title or interest in or to all of that part of Sections Seventeen (17), Twenty (20), Twenty-one (21), Twenty-two (22), and Twenty-three (23), Township 1 North, Range 18 East of the 6th P.M. in Richardson County, Nebraska, bounded on the north and east by the survey line of 1855-56 as established by the Surveyor General's Office of the United States, being the then meander line of the middle [fol. 53] of the channel of the Missouri River, and bounded on the west and south by the present meander line of the said Missouri River, real names unknown."

Wherefore, plaintiff prays for a Decree of this Court quieting and confirming plaintiff's title in and to the herein described real estate and against the claims of the defendants, or any one claiming by, through or under said defendants, and for such other and further relief as equity may require.

Gene Durfee, Plaintiff,

By /s/ Fitzgerald, Ross & O'Connor
His Attorneys

State of Nebraska )
) ss.
County of Douglas )

Gene Durfee, being first duly sworn on oath, deposes and states that said affiant is the petitioner herein; that he has read the above and foregoing Petition, knows the contents thereof and that the same are true as he verily believes.

/s/ Gene E. Durfee

Subscribed and sworn to before me this 16 day of May, 1957.

/s/ Laura M. Jones
Notary Public

(Seal)

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[fol. 54]

Exhibit "C" to Alternative Motion and Answer

In the District Court of Richardson County
Nebraska

Filed
Jul 27 1957
Fred C. Zorn, Clk of Dist Ct

---

Gene Durfee — Plaintiff

vs.

Ralph Keiffer, et al — Defendants

---

Answer

Come now Ralph Keiffer, Deana Keiffer, Russell Nauman and Caroline Nauman, Nellie M. Duke and Julia E. Duke, defendants, and for their answer to the Amended Petition of the plaintiff allege and say:

I

That the lands described in the petition of the plaintiff, and for the recovery of which the action is brought, are wholly situated in Holt County, Missouri, and not within the jurisdiction of this Court.

II

Defendants deny each and every allegation contained in plaintiff's petition which is not herein specifically admitted to be true.

## III

Defendants admit that they are in possession of a portion of the land described in plaintiff's petition and that defendants Nellie M. Duke and Julia E. Duke claim to be the owners of the portion of the land described in plaintiff's petition.

Wherefore defendants pray that plaintiff's petition be dismissed at plaintiff's costs and that defendants recover their costs herein expended and for such other and further relief as may be just and equitable in the premises.

Ralph Keiffer
Deana Keiffer
Russell Nauman
Caroline Nauman
Nellie M. Duke
Julia E. Duke
Defendants

By /s/ Pettijohn & Eiser
and /s/ Wiltse & Wiltse
Their Attorneys

[fol. 55]

State of Nebraska )
) ss
Richardson County )

John H. Wiltse being first duly sworn, on oath deposes and says that he is one of the attorneys for the defendants in the above entitled action and that he makes this verification as attorney for the reason that the defendants are absent from Richardson County, Nebraska; that he knows the contents of the foregoing answer and that the allegations therein contained are true as he believes.

.....

Subscribed in my presence and sworn to before me this ..... day of July, 1957.

.....
Notary Public

My commission expires:

[Stamp]

[fol. 57]

EXHIBIT "E" TO ALTERNATIVE MOTION AND ANSWER

IN THE DISTRICT COURT OF RICHARDSON COUNTY NEBRASKA

Case No. 12120.

---

GENE DURFEE and LAURA DURFEE,

Plaintiffs,

—vs—

RALPH KEIFFER, if married ..... KEIFFER, his wife, first, real and true name unknown; RUSSELL NAUMAN, if married, ..... NAUMAN, his wife, first, real and true name unknown; JOHN DOE and JANE DOE, husband and wife, real names unknown; NELLIE N. DUKE, if married, ..... DUKE, her husband, first, real and true name unknown; JULIA E. DUKE, if married, ..... DUKE, her husband, first, real and true name unknown,

Defendants.

---

DECREE

THIS MATTER came on for trial on the 27th and 28th day of May, 1958 upon the Petition of plaintiff, and the Court, being fully advised in the premises, finds that it has jurisdiction of the parties and the subject matter.

Upon leave duly granted, Laura Durfee was made an additional party plaintiff.

Upon consideration of the pleadings and the evidence, plaintiffs being present in court and represented by their counsel, August Ross and Alfred A. Fiedler, and defendants being present in court and being represented by their counsel, Wiltse & Wiltse of Falls City, Nebraska, and Pettijohn & Eiser of Oregon, Missouri, evidence received, the Court finds generally in favor of plaintiffs and against defendants.

The Court finds that the allegations contained in plaintiffs' petition are true; that the hereinafter described real

estate is situated within the State of Nebraska; that the [fol. 58] plaintiffs' title limited to the formed island and the accretions thereto lying South and West of chute, which property is more particularly described as follows, to-wit: All that part of Sections 20, 21, 22, 27 and 28 lying South and West of the middle of the chute formed by an old channel of the Missouri River all in Township 1, North, Range 18 East of the 6th P.M., in Richardson County, Nebraska, should be quieted and confirmed in the plaintiffs and against the claims of the defendants and anyone claiming by, through or under said defendants.

It Is, Therefore, Ordered, Adjudged and Decreed that plaintiffs' title to the following described real estate, to-wit: All that part of Sections 20, 21, 22, 27 and 28 lying South and West of the middle of the chute formed by an old channel of the Missouri River all in Township 1, North, Range 18 East of the 6th P.M., in Richardson County, Nebraska, be, and the same is, quieted and confirmed in plaintiffs and against the claims of the defendants, and each of them, and anyone claiming by, through or under said defendants, and said defendants be, and they are hereby, enjoined from claiming any right, title or interest in and to said described real estate; that plaintiffs have judgment against the defendants for their costs herein expended.

Dated at Falls City, Nebraska this 8 day of August, 1958.

By the Court:

/s/ Virgil Faloon
District Judge.

O. K. as to Form
Wiltse & Wiltse

[fol. 59]

EXHIBIT "F" TO ALTERNATIVE MOTION AND ANSWER

IN THE SUPREME COURT OF NEBRASKA

---

DURFEE

v.

KEIFFER

---

34523

Filed March 27, 1959.

* * * * * * * * *

[fol. 63] Heard before Simmons, C. J., Carter, Yeager, Chappell, Wenke, and Boslaugh, JJ.

SIMMONS, C. J.

This is an action to quiet title to land. As originally brought it involved a claim to land lying on both sides of an old chute in the Missouri River. At the area involved the Missouri River runs generally in an east and west direction. The land lying east and north of the chute appears to have been owned by defendant Nellie N. Duke, she having a life estate, with remainder in three children. The land lying south and west of the chute was claimed by the defendant, Julia E. Duke.

Issues were made and trial was had resulting in a decree that plaintiffs were the owners of the land involved lying south and west of the middle of the chute. Defendants appeal. There is no cross-appeal by plaintiffs. Hence the appeal here involves only the lands claimed by defendant Julia E. Duke. We, then, consider it as an appeal in an action brought against defendant Julia E. Duke, hereinafter called defendant, and her tenants.

Plaintiffs alleged in their petition the ownership of the land; that they were owners under and by virtue of a deed executed and delivered as the result of a tax foreclosure

proceeding in Richardson County; that the land was situated wholly in the State of Nebraska; that it was west of the meander line of the middle of the channel of the Missouri River as established by a United States government survey in 1855-1856; that the Missouri River by avulsion in 1916 changed its course to its present channel west and south of the land involved; and that the boundary between the states remained as it existed at the time of the 1855-1856 survey.

[fol. 64] Defendants answered and alleged that the lands were wholly in the State of Missouri and not within the jurisdiction of the court. They then denied generally, admitted possession, and claimed ownership. They prayed for a dismissal of the plaintiffs' petition.

At the trial defendant testified that she based her claim of title on a swamp land patent from the State of Missouri.

On appeal here defendant argues that she proved ownership by adverse possession. Plaintiffs contend that such a claim must be affirmatively pleaded and cannot now be raised. It does not appear that such a contention was advanced to the trial court. Defendant's testimony negatives it. Claim of ownership by adverse possession is advanced here for the first time.

The rule is: This court will dispose of a case on appeal on the theory on which it was presented to the trial court by the parties. See O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123.

This cause is here for trial de novo subject to the rule that: In equity cases when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. See Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393.

Both parties here introduced a large number of aerial photographs, maps, and charts of the area where the land in dispute is located. The record is replete with the testi- [fol. 65] mony of witnesses who referred to locations of land, buildings, fences, dikes, streams, etc., by general statements of "here" and "there," and "indicated" to the trial

court the reference to the location they were testifying about. In many instances we are unable to determine with any degree of certainty to what they refer, and in some instances even the exhibits mentioned cannot be identified. Trial courts should not permit a record to be made of testimony referring to exhibits without requiring counsel and witnesses to identify for the record that about which they testify. Where such a record is made we have no recourse but to apply the above equity rule, and do so here.

It is advisable at this point to state the rules of law that are to be considered here. The parties here are not in disagreement that the boundary between Missouri and Nebraska at the time of the admission of the states to the Union was the center of the channel of the Missouri River. We have held: "'That boundary may and does fluctuate with the changes of the channel of that stream where the alteration is gradual and imperceptible; but, when by a sudden variation the stream seeks and marks for itself an entirely new course and abandons the old path, the boundary remains along the line which constituted the center of the old channel.'" Lienmann v. County of Sarpy, 145 Neb. 382, 16 N. W. 2d 725.

"Where the main channel of the river changes by accretion and decretion, the boundary between the two states follows the channel. • • • Where the main channel of the river changes by avulsion to a new course, the boundary does not change but becomes fixed along the line which [fol. 66] constituted the center of the old channel. • • • Lands cut off from the mainland of a state by avulsion do not change their status but remain a part of the state from which they were cut off." Lienmann v. County of Sarpy, *supra*.

"Land uncovered by a gradual subsidence of water is not an accretion, but a reliction. The same law applies to both these forms of addition to real estate which are held to be the property of the abutting landowner. • • • Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land

by the lowering of the surface level from any cause. * * * Where by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner. * * * The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto. * * * Where the accretion commences with the shore of the island and afterward extends to the mainland, or any distance short thereof, all the accretion belongs to the owner of the island; but, where accretions to the island and to the mainland eventually meet, the owner of each owns the accretions to the line of contact." Burket v. Krimlofski, 167 Neb. 45, 91 N. W. 2d 57.

"Avulsion is the sudden and rapid change in the course and channel of a boundary river. In Nebraska v. Iowa, 143 U. S. 359, 12 S. Ct. 396, it was said: 'It is equally well [fol. 67] settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion.'" Conkey v. Knudsen, 143 Neb. 5, 8 N. W. 2d 538.

We here refer to the banks of the Missouri River as the left bank and as the right bank, as they appear looking down stream.

We find the following factual situation from the record.

During annual flood periods the river ran over a wide area in the location in question. At normal and low water flow it followed a fairly well defined main channel.

Prior to 1855, the main channel of the Missouri River flowed some distance to the north and east of the location of the land in question. The 1855-1856 survey shows that the main channel of the river had moved west and south, but was still east and north of the land in question. The evidence is ample that thereafter the main channel of the river for many years was along the course of the "old chute"

to which witnesses refer and to which the trial court referred in its decree.

About 1887 a railroad bridge was built across the river a short distance above the area in question. The open span was near the right bank of the river. An extended dike led to the bridge on the left side of the river. The construction of the bridge had the effect of shifting the main channel of the river to the west and south. Sand bars [fol. 68] and shallow water appeared to the east and north of the new channel and west and south of the former main channel. The land involved here began as an island in that area. It grew by accretion.

At least by 1930, it was sufficiently established to be claimed by a person who quitclaimed it to a Mr. Slagle in 1932. At that time there was a defined channel west and south of the island. However, the evidence of eyewitnesses is that the main channel of the river continued its course along what is now the "old chute."

Mr. Slagle had a cabin on the island, fenced parts of it and kept livestock on it, and had an employee on it at times. He continued in possession of it until 1943, and paid taxes to Richardson County on it until 1944. In 1933 or 1934 the United States government began the work of channel control on the river. In the next few years as a result of that work the main channel of the river was moved to the west and south. As a result of silting in times of flood the island increased by accretion.

In 1943 or 1944, defendant entered upon the island from the old left bank across the old chute, burned grass and underbrush, built a fence along the chute, and undertook to do some plowing. When the river was in high water stage, water flowed through the old channel where the chute now is located. Recurring annual floods prevented much development until 1954 or 1955 when over 200 acres of land were cleared by defendant and put to crops.

If the river shifted by avulsion from its first position to the main channel as it was and where the chute now is, that shift would avail defendant nothing for the boundary between the states would remain where it was before the [fol. 69] avulsion. If, however, that moving of the channel

to the west and south was by accretion, it would avail the defendant nothing for the land here involved is not accreted land to the old left bank of the river.

We are here dealing with an island that formed in the river west of the main channel of the river when it ran where the chute now is. That island grew by processes of accretion and finally by reliction. The boundary of the mainland and that of the island meet at the thread of the old chute.

The left bank of the river did not move west and south by accretions to the river bank. Rather, as a result of the works of man and the forces of the water, the river established a new main channel to the west and south of the island.

The question is: Is the island in Missouri or Nebraska? The effect of the trial court's finding is that it is in Nebraska.

We think it patent that we cannot apply the rule of accretion to the changed course of the stream. Rather it is a situation to which the rule of avulsion applies.

In Whiteside v. Norton, 205 F. 5, 45 L.R.A.N.S. 112, the court was presented with a similar fact situation and held that the cutting of a new channel was analogous to avulsion.

In James v. State, 10 Ga. App. 13, 72 S. E. 600, the court had a somewhat similar problem to solve. The court held that there was no evidence of a change "by the sudden and violent process of avulsion," yet the act of the United States government in changing the course of a river to improve navigation was analogous to a change caused by avulsion and not by accretion, and that the boundary line was not [fol. 70] affected.

In State v. Ecklund, 147 Neb. 508, 23 N. W. 2d 782, we had a quite similar set of facts and decided this precise question by applying the rule of avulsion. We quoted with approval this language from Commissioners v. United States, 270 F. 110: "'* * * * where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during

many years by the gradual or occasional increase from year to year of the proportion of the waters of river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream.'"

The above decision is controlling here. We hold that the land involved in this appeal, lying south and west of the old chute, is within the State of Nebraska; that the trial court had jurisdiction of the cause; and that defendant's swamp land patent from the State of Missouri conveyed no title to her.

This decision is not to be construed as deciding in any way the jurisdictional location of the land east and north of the old chute, as that land is not involved in this action as it comes to us here.

[fol. 71] Defendant, assuming that we might find that the land involved is in the State of Nebraska, relies on the rule that: Plaintiff in an action to quiet title has the burden of proof and he must recover upon the strength of his title and not because of any weakness in the title of his adversary. See Stratbucker v. Junge, 153 Neb. 885, 46 N. W. 2d 486. She contends that plaintiffs have not met their burden of proof.

Defendant here contends that the sheriff's deed under which plaintiffs claim title was void.

It is not claimed by defendant that there was any residence on the land where service at the usual place of residence could have been had. It is not claimed that defendant was a resident of Nebraska. In fact the evidence shows that she was a resident of Missouri. It is not claimed that there was anything of record in Richardson County that showed the defendant had or claimed any title or interest in this land.

The foreclosure action named the Slagles as defendants. It named John Doe and Mary Doe and all persons having or claiming to have any interest in any part of the described

real estate. As to John Doe and Mary Doe the sheriff's return showed that they were not found in Richardson County.

Defendant's claim rests upon that part of section 25-321, R. R. S. 1943, regarding service upon unknown defendants which provides: "Judgments and decrees against persons so designated and made defendants and served by publication as herein provided shall be conclusive as against all persons who are not in actual possession of such property and whose ownership of, interest in, rights or title to, or lien upon such property does not appear of record in or [fol. 72] by their respective names in the county wherein such property is situated."

Defendant contends that she was in "actual possession" and hence entitled to the protection of the act. Defendant makes no charge of irregularities in the proceedings other than the above.

It is to be remembered that when defendant entered upon the land in 1943 or 1944, to the limited extent shown, she entered as a trespasser. After 1946, she claimed under and by virtue of the Missouri land patent. She made no claim to a right of possession otherwise.

The petition of foreclosure was filed August 23, 1955. The sheriff made return of service on August 26, 1955. The decree was rendered on December 15, 1955. The sale was confirmed and the deed to plaintiffs issued and recorded on February 24, 1956.

The question, then, relates to defendant's claim of possession during the above period.

As to that the evidence is extremely meager. The evidence is that there were 220 acres of growing crops on the land in 1955. Defendant testifies that she was in "possession," and received no summons or notice of the foreclosure proceedings. The nearest she comes to defining her possession is to refer to "the land I was supposed to be in the operation of."

A Mr. Keiffer testified that he started farming for defendant on this land in 1954; that "I had about 200 acres" and a good crop growing there in August 1955; and that he was not served with summons. A Mr. Nauman testified that in 1955 he "worked" for Mr. Keiffer. No one undertook

[fol. 73] to testify as to the nature of the arrangements whereby Keiffer farmed for defendant. In her brief here defendant refers to Keiffer and Nauman as "her tenants." Whether that relates to the time of the tax foreclosure action or the time the instant action was started is not certain.

Neither Keiffer nor Nauman is named as defendant in the tax foreclosure action. They are named as defendants in the instant action brought in November 1956, as parties in possession of a part of the premises. Their answer filed jointly with the Dukes admits possession and alleges ownership in the Dukes. Neither Keiffer nor Nauman is here claiming any invasion of his rights. The contention here is solely that of the defendant.

We find nothing in the record that even suggests that there was anyone resident on the land or even working on the land when this action began upon whom service of summons could be had. The sheriff's return, which imports verity, negatives any such a conclusion. There is no suggestion that anyone going to the land could have found anyone or anything there that would have suggested where inquiry could be made to determine who, if anyone, claimed any interest in the land. In fact there is no evidence as to where the defendant or her "tenants" were during the period here involved. They make no showing that they were on the land, or in the area of the land, or were either in the State of Missouri or State of Nebraska.

The defendant's position rests solely on the fact that Mr. Keiffer farmed the land for her and that there were over 200 acres of growing crops thereon.

Does that establish "actual possession" within the contemplation of the statute? What did the Legislature intend [fol. 74] when it used the term "actual possession"?

In Parsons v. Prudential Real Estate Co., 86 Neb. 271, 125 N. W. 521, 44 L.R.A.N.S. 666, where the tax laws required service of notice upon "every person in actual occupancy of" the lands, an attack was made on a tax deed upon the ground that one Parker was in "actual occupancy" of the premises and that no notice was served on him. Parker was a trespasser and did not live on the land, but cropped the ground. We accepted the following definition:

"'Occupant' * * * 'One who occupies; an inhabitant; especially, one in actual possession, as a tenant, who has actual possession, in distinction from the landlord, who has legal or constructive possession.'" We held that Parker was not an actual occupant of the land.

That decision was filed March 10, 1910. The part of the statute here involved was enacted in 1921. See Laws 1921, c. 226, s. 1, p. 815. So we had defined the term before the Legislature adopted it.

The rule is: It is to be presumed that the Legislature in using language in a statute gave to it the significance that had been previously accorded to it by the pronouncements of this court unless a different meaning has been provided by the context of the statute. See Gomez v. State ex rel. Larez, 157 Neb. 738, 61 N. W. 2d 345.

We adhered to the above definition in Quist v. Duda, 159 Neb. 393, 67 N. W. 2d 481.

We construed Parsons v. Prudential Real Estate Co., *supra*, in Kuska v. Kubat, 147 Neb. 139, 22 N. W. 2d 484. The court said: "In that case service of notice to redeem [fol. 75] was given to nonresidents only by publication, as in the case at bar. At that time there was a person in actual possession or occupancy of the property but he was a trespasser. No personal service of notice to redeem was had upon him. This court held that none was necessary. In construing the Constitution and applicable statute, it was held that 'occupants' and 'actual possession or occupancy' were synonymous and meant actual, open, visible possession or occupancy in fact, exactly that and nothing less, as distinguished from constructive possession. It was also held that the actual possession or occupancy must be by one claiming an interest in the property either in privity with or adversely to the owner as distinguished from a mere trespasser."

Defendant relies here on Harris v. Heeter, 137 Neb. 905, 291 N. W. 721, 128 A. L. R. 111. There we merely applied the rule of actual possession to the facts. The facts of that case are so dissimilar to the facts here that no comment is required.

It necessarily follows that defendant's attack upon plaintiffs' title by the tax deed has no merit.

We arrive at the same conclusion by another line of reasoning.

It will be noted that section 25-321, R. R. S. 1943, in summary requires an allegation in the petition or other pleading that there are persons who claim to have some interest in the property; that it does not appear of record; that diligent investigation and inquiry have been made; and that the person in whose behalf the investigation has been made does not know the names, whereabouts, or residence of such persons. Section 25-518, R. R. S. 1943, requires [fol. 76] an affidavit supporting the allegation. Section 25-517, R. R. S. 1943, requires a court order for service by publication after the court is satisfied that sufficient investigation has been made. It is obvious that such a procedure was intended to establish a "conclusive" record in accord with the facts shown and established to the satisfaction of the court, as against all persons except those "in actual possession" (s. 25-321, R. R. S. 1943), whose interest in the property does not appear of record.

In Draper v. Taylor, 58 Neb. 787, 79 N. W. 709, we stated this rule: Possession of land is notice to the world of the possessor's rights therein.

This holding was followed in Blum v. Voss, 139 Neb. 233, 297 N. W. 84, and Blum v. Poppenhagen, 142 Neb. 5, 5 N. W. 2d 99.

There is a companion rule stated in Talich v. Marvel, 115 Neb. 255, 212 N. W. 540, followed in Marshall v. Rowe, 126 Neb. 817, 254 N. W. 480, and Hollenbeck v. Guardian Nat. Life Ins. Co., 144 Neb. 684, 14 N. W. 2d 330, which is: Where one is put upon inquiry, he is to be charged with notice of all such facts he would have learned by reasonable inquiry.

It must be assumed that the Legislature had these rules in mind in making the requirements of allegations, proof by affidavit, and court finding and order.

It is obvious that what the Legislature intended was that a party against whom such service by publication had been had could, by proof of actual possession at the time involved, disprove the truth of the showing upon which the court had [fol. 77] permitted the service by publication to be made.

The Legislature limited that right to strict compliance with proof of actual possession in the literal meaning of those words. It did not permit the opening up of the conclusive effect of the service by publication except upon a showing of that condition in fact. The showing here is patently insufficient to meet this test.

Defendant advances a further contention based upon the following from Maryland v. West Virginia, 217 U. S. 1, 30 S. Ct. 268, 54 L. Ed. 645: "Where possession of territory has been undisturbed for many years a prescriptive right arises which is equally binding under the principles of justice on States and individuals."

There again the facts are so dissimilar that we see no reason for discussing the case here.

The judgment of the trial court is affirmed.

AFFIRMED.

Messmore, J., participating on briefs.

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[fol. 78] THE STATE OF NEBRASKA, ss.

I, George H. Turner, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that I have compared the foregoing copy of an opinion filed by said Court on the 27th day of March 1959 with the original on file in my office and that the same is a correct transcript thereof, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of said Court, at the City of Lincoln, this 27th day of March 1959.

/s/ GEO. H. TURNER
Clerk

By .....
Deputy

[fol. 79]

EXHIBIT "G" TO ALTERNATIVE MOTION AND ANSWER

MANDATE.
Form No. 1.

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

Sitting at Lincoln January Term, 1959

TO THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, sitting in and for the County of Richardson GREETING:

WHEREAS, in a late action before you, wherein Gene Durfee and Laura Durfee were plaintiffs and Ralph Keiffer, Deana Keiffer, Russell Nauman, Carolyn Nauman, Julia E. Duke, et al were defendants, a judgment was rendered by you, upon a transcript of which record and proceedings in your said Court, the said defendants prosecuted an appeal to the Supreme Court of the State of Nebraska, upon a trial of which cause in said Supreme Court during the January Term, A. D. 1959, it was considered by said Court that the judgment rendered by you be affirmed ..... ..... at the costs of said defendants taxed at $87.40.

NOW, THEREFORE, You are commanded, without delay, to cause execution to issue carrying into effect your said judgment in the manner provided by law.

WITNESS, The Hon. Robert G. Simmons, Chief Justice, and the Seal of said Court, this 29th day of May, 1959.

GEORGE H. TURNER
Clerk

By .....
Deputy

[fol. 186] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI

ST. JOSEPH DIVISION

No. 1027

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JULIA E. DUKE, Plaintiff,

vs.

GENE DURFEE and LAURA DURFEE, husband and wife, et al., Defendants.

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MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW—January 23, 1961

Plaintiff, a resident of Missouri, instituted this suit against the defendants in the Circuit Court of Holt County, Missouri, on May 23, 1959, alleging that she is the owner in fee simple and in possession of the real estate described in the "Petition". (The land described by metes and bounds is quite long and consists of several hundred acres of an island in the Missouri River Bottoms, and in view of the court's determination of the case, I see no reason to set out the description here.)

The case was removed to this court by the defendants, Gene and Laura Durfee, residents of the State of Nebraska. This court has jurisdiction by virtue of nonresidency of said defendants and the amount in controversy, which exceeds the sum of $10,000.00.

[fol. 187] Plaintiff alleged that the defendants Drufee claim some right, title or interest in and to said real estate, and that the defendants Ralph Keiffer and Russell Nauman are in possession of the property as tenants of the plaintiff; that the defendant, First State Bank of Forest City, Missouri, is the beneficiary, and defendant James H. Pettijohn is the trustee of a deed of trust, and that such parties have no interest in the litigation other than that set out herein.

Plaintiff asks the court to decree that the fee simple title is in her and that the defendants be forever enjoined and restrained from asserting or claiming any right, title or interest in or to any of said property.

Plaintiff claims ownership by virtue of a Swamp Land Patent issued to her by the State of Missouri (Holt County) under the provisions of §241.220 R. S. Mo. 1949, in 1946.

The evidence reveals that the defendants Durfee obtained a sheriff's deed to the property as the result of a tax foreclosure sale by Richardson County, Nebraska. Plaintiff also claims title by adverse possession, which will be discussed hereafter.

The main channel of the Missouri River was established as the boundary between Missouri and Nebraska at the time Nebraska was admitted to the Union.

[fol. 188] It is the defendants' contention that the land in controversy is on the Nebraska side of the main channel of the Missouri River, and thus the property of the State of Nebraska.

In 1956, the defendants Durfee brought an action in the District Court of Richardson County, Nebraska, against Julia E. Duke and her tenants, to quiet title, alleging that they were the owners by virtue of the sheriff's deed, as heretofore mentioned.

The defendants in that case raised the issue of the sufficiency of the service upon them, which was overruled by that court, and they then submitted themselves to the jurisdiction of the court and joined in the trial of the issue as to whether the land in controversy was in the State of Missouri or in the State of Nebraska.

After hearing all of the evidence, the District Court made a general finding that the land was in Nebraska; that the plaintiffs were the owners thereof, and that the defendants had no right, title or interest thereto. On appeal by the defendants to the Nebraska Supreme Court, the action of the District Court was affirmed in an opinion in 95 S. W. 2d 618.

Because the District Court had not made any Findings of Fact or Conclusions of Law, the Supreme Court tried the case de novo, made its Findings of Fact and Conclusions

of Law, and also arrived at the determination that the land was in the State of Nebraska.

[fol. 189] That court fully discussed the evidence, the maps and other exhibits as a basis for its finding. There was no appeal by the defendants from the decision of the Nebraska Supreme Court to the Supreme Court of the United States. Instead the defendant there, Julia Duke, instituted this suit in the State of Missouri.

Here, the defendants raise the question of the jurisdiction of this court to hear and determine the issues, as they were determined by the Nebraska Court, and contend that the decision in the Nebraska Court is final and is entitled to full faith and credit and is res judicata.

I concur in the finding of the Nebraska court that prior to 1855, the main channel of the Missouri River flowed to the north and east of the location of the land in question here. The survey of 1855-56 shows that the main channel of the River had moved west and south of its location prior to that time, but was still east and north of the land in question.

In 1877 a railroad bridge was built across the river above the land that is now in question. The open span of the bridge was near the right bank or the Nebraska side of the river. An extended dike was constructed on the left side or the Missouri side of the river, leading to the bridge.

[fol. 190] It is contended, and I think it is true, that this work had the effect of shifting the main channel of the river to the west and south. It is probable that it was in this area that islands began to form and grow by accretion, and it was the islands and the land thus created that plaintiff testifies she remembers in the early '20s. At least by 1930, they had grown sufficiently that one Slagle in 1932 laid claim to them by virtue of a quit claim deed.

The Nebraska court found that at that time there was a defined channel west and south of the island. That court however, found that the main channel of the river continued its course along what is now the old chute.

Slagle built a cabin on the island, fenced part of it and apparently ran some livestock on it, and continued in possession until about 1943, and paid taxes to Richardson

County, Nebraska. It was shortly after Slagle obtained possession of it, (probably 1933-34) that the Government began its channel control work. Thereafter, as a result of this work, the channel of the river was moved to the west and south.

Apparently it was upon these facts that the Nebraska court determined that the change in the course of the river resulted from avulsion rather than from attrition or accretion.

In arriving at its conclusion, the Supreme Court of Nebraska in syllabus 7 which was written by the court, l. c. 620 of its opinion, said:

> [fol. 191] "The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto."

At page 624 of its opinion, that court stated:

> "We are here dealing with an island that formed in the river west of the main channel of the river when it ran where the chute now is. That island grew by processes of accretion and finally by reliction. The boundary of the mainland and that of the island meet at the thread of the old chute."

Considering the court's own statement, I think it must be assumed that prior to the cutting of what is referred to as the "new chute and channel" the main channel of the river was to the west of the island formation.

I am unable to find any evidence in the case that is convincing to me that the chute was the result of the gradual change of the course of the river. To me, the most convincing evidence is that the chute which was formed in the early '20s, was the result of avulsion occasioned by the accumulation of ice which suddenly cut a new channel, but I do not believe the evidence shows that this new chute or channel became the main channel of the river.

Following the course of the river from 1846 to the period prior to the cutting of the channel, I find no evidence of the formation of a new channel by avulsion, unless it was the

chute referred to above. If the channel was the result of avulsion, as it is my conclusion it was, and if the main [fol. 192] channel prior thereto was west of the formation of the island, then, of course, the property lines did not change nor did the boundary between Nebraska and Missouri change.

The question of ownership by adverse possession was not raised by the defendants in the Nebraska District Court, but was raised in the Supreme Court. That court held that it was bound to determine the case upon the same issues that were presented to the District Court, and, therefore, refused to consider the question of adverse possession.

In arriving at its conclusion, the Supreme Court of Nebraska found:

> "Prior to 1855, the main channel of the Missouri River flowed some distance to the north and east of the location of the land in question. The 1855-1856 survey shows that the main channel of the river had moved west and south, but was still east and north of the land in question. The evidence is ample that thereafter the main channel of the river for many years was along the course of the 'old chute' to which witnesses refer and to which the trial court referred in its decree
>
> "About 1887 a railroad bridge was built across the river a short distance above the area in question. The open span was near the right bank of the river. An extended dike led to the bridge on the left side of the river. The construction of the bridge had the effect of shifting the main channel of the river to the west and south. Sand bars and shallow water appeared to the east and north of the new channel and west and south of the former main channel. The land involved here began as an island in that area. It grew by accretion.
>
> "At least by 1930, it was sufficiently established to be claimed by a person who quitclaimed it to a Mr. Slagle in 1932. At that time there was a defined channel west and south of the island. However, the evidence of eyewitnesses is that the main channel of the river continued its course along what is now the 'old chute'.

[fol. 193] "Mr. Slagle had a cabin on the island, fenced parts of it and kept livestock on it, and had an employee on it at times. He continued in possession of it until 1943, and paid taxes to Richardson County, on it until 1944. In 1933 or 1934 the United States government began the work of channel control on the river. In the next few years as a result of that work the main channel of the river was moved to the west and south. As a result of silting in times of flood the island increased by accretion.

"In 1943 or 1944, the defendant entered upon the island from the old left bank across the old chute, burned grass and underbrush, built a fence along the chute, and undertook to do some plowing. When the river was in high water stage, water flowed through the old channel where the chute now is located. Recurring annual floods prevented much development until 1954 or 1955 when over 200 acres of land were cleared by defendant and put to crops.

"If the river shifted by avulsion from its first position to the main channel as it was and where the chute now is, that shift would avail defendant nothing for the boundary between the states would remain where it was before the avulsion. If, however, that moving of the channel to the west and south was by accretion, it would avail the defendant nothing for the land here involved is not accreted land to the old left bank of the river.

"We are here dealing with an island that formed in the river west of the main channel of the river when it ran where the chute now is. That island grew by processes of accretion and finally by reliction. The boundary of the mainland and that of the island meet at the thread of the old chute.

"The left bank of the river did not move west and south by accretions to the river bank. Rather, as a result of the works of man and the forces of the water, the river established a new main channel to the west and south of the island.

"The question is: Is the island in Missouri or Nebraska?

"The effect of the trial court's finding is that it is in Nebraska.

[fol. 194] "We think it patent that we cannot apply the rule of accretion to the changed course of the stream. Rather it is a situation to which the rule of avulsion applies."

The question of res judicata was timely raised by the defendants by Motions to Dismiss in this court, and were by this court overruled before the case came on for trial.

It is plaintiff's contention that the question of jurisdiction may be raised at any time, and that the factual situation as to whether or not the land is actually in Nebraska or Missouri would determine the question of the jurisdiction of this court regardless of any Findings of Fact or Conclusions of Law reached by the Nebraska courts in the former trial.

At the time the Motion to Dismiss was determined by the court, it was felt that the whole matter should be presented to the court so that it could make such decision as it felt necessary to a full and complete determination both of the question of jurisdiction and the question of fact.

The decisions of the state and national courts involving the title to lands along the Missouri River and islands therein, are so numerous that they fill many volumes. Such questions are always troublesome to the courts, although the principles of law involved are well settled.

[fol. 195] Before it was subdued, the Missouri River was the greatest outlaw the West has ever known. It was as nomadic as the tribes that lived along its banks and gave it its name. It was no respecter of persons or property. It often took from those who had and gave to those who had not; it often took from the poor and gave to the well-to-do.

When we attempt to determine where the channel was from year to year prior to the period when the channel stabilization program began, we must rely upon the memory of man to a very large degree, and, of course, the memory of man is often faulty and fades with time, and no two pairs of eyes see the same thing in the same way, although they may be equally honest in their attempt to describe that which actually exists.

Islands are formed in the Missouri River during one high water period and taken away in another. They are moved from one place to another, sometimes slowly, sometimes over night. Land and islands may be created by accretion, by avulsion or by attrition. There is no dispute about the legal principle that when the river suddenly changes its channel or its course, the property lines existing prior thereto are not affected, and that includes the boundaries between these states. If the main channel of the river changes by attrition or as the result of erosion, the boundary follows the course of the river.

[fol. 196] It was not until the Corps of Engineers of the United States Army began the work of controlling the channel of the Missouri River for navigation purposes and later for flood control purposes, that its course had any stability. Since that time it has reasonably been confined within the areas charted by the engineers.

The history of the land in question goes back to as early as 1916, when the father of the plaintiff first acquired the land of which the land in question is now a part. Plaintiff testified that her father had acquired a part of the land in 1916 by purchase; that she remembered in the early '20s that there was land south and west of her father's land; that as a schild she remembered having walked out on that land.

A portion of a cottonwood tree was introduced in evidence at the time of this case, which the plaintiff testifies was cut on the land in controversy in 1959. The state forester of Missouri testified that the tree was at least 35 years old, which indicated that the land, at least some portion of it, had existed with sufficient permanency to support the growth of shrubbery and trees for that many years. Plaintiff further testifies that her father from time to time had livestock on a portion of the land in controversy.

Plaintiff remembers when the chute was formed in the mid-'20s. She says the river cut-through was caused by an ice gorge. She remembers her father's attempt to sta-
[fol. 197] bilize the bank of the river at the place where the chute cut through. She further testifies that as a result of the cutting through, approximately 100 acres of her father's

land was cut away, because thereafter that amount was removed from the tax rolls in Holt County, Missouri.

To me, the evidence clearly reveals that prior to the cut-through and the formation of the chute, the main channel was to the south and west of the land in controversy.

Some time in the early '30s the Government began its work of stabilizing the Missouri River by placing revetments and whatever other types of engineering devices the particular nature and character of the work required. These dikes started on the Missouri side of the river and extended through the plaintiff's land, and plaintiff says to the main channel of the river. Thereafter there was a gradual closing of the chute.

In 1943, the plaintiff began to use a portion of the land' she caused a portion of it to be burned off and a portion of it was cultivated, but it was not until 1946 that she acquired the deed which has heretofore been described. In 1946, she bought a bulldozer and started building a crossing across the chute. From year to year thereafter plaintiff continued to put forth such effort as the season would permit, to bring additional portions of the land under cultivation.

[fol. 123] Naturally, the extent of the high water would determine the extent she was able to carry on these activities. The nature of the season and the extent of the high water would also determine the rapidity with which the chute was filled up. Whether or not this chute was ever the main channel of the river, is, of course, the principal question in this controversy.

Assuming that prior to the cutting of the chute the main channel and the boundary line between the states were to the south and west of the land in controversy, the sudden cutting of the chute, even if it created a new main channel, would not have changed the line, because it was by avulsion and did not affect property lines.

It is a matter of common knowledge among those who have lived along the river, that islands rise from season to season, and may shift from season to season, depending upon the amount of high water, and, as one of the expert witnesses expressed it, the result of numerous "flows" or

"currents" which may not constitute the main channel of the river.

The evidence revealed that there are many currents and cross-currents in the Missouri River, but not necessarily are such currents or cross-currents the main channel of the river. They do, however, materially affect the development and the building of islands and the cutting of minor chutes through an island. At one season of the year there may be a chute through an island, and at another season and after a period of high water the chute may have completely dis- [fol. 199] appeared. As the island increases in size and height and vegetation begins to grow upon it, it gathers more sediment, mud and silt, thus becoming more secure and develops with much greater rapidity.

Certainly if the area which constituted the chute was the main channel and was caused to fill up gradually because of the building of the revetments by the Army Engineers, it did not suddenly change its course. Whether or not the river changes its channel gradually or suddenly as the result of the engineering efforts of man, does not affect property rights or the line between the states. If the channel of the river was caused to move slowly because of the revetments, the property lines would follow it. If it was caused to move suddenly, they would not follow it.

I have carefully reviewed the evidence that was introduced in the Nebraska court and in this court, including the two experts who have had much experience in construction work on the Missouri River, and I am convinced that the evidence clearly shows that prior to the formation of the island in controversy, the main channel of the river was to the south and west thereof.

With due respect to the learned gentlemen on the Nebraska courts for whom I have the most profound respect, I am unable to agree with them that the chute became the main channel. But, if it did become the main channel, it was by avulsion and did not affect the boundary line. [fol. 200] There is no contention in this case that the land formerly acquired by the plaintiff's father and now belonging to her mother, is on the Nebraska side of the river, and if that is true, it is difficult for me to understand how, under all the evidence, that the land in controversy is, or was at

the time the issue was determined by that court, in Nebraska.

During a long period of time both states apparently exercised jurisdiction over the land; the prosecuting attorneys of both states exercised jurisdiction over it; the alleged Nebraska owners did not exercise any supervision or occupancy of the land from the late '30s or early '40s until this suit was brought in 1959, and plaintiff was in unquestioned, undisputed possession of the land from 1943 until the present time.

It is my definite conclusion that under all the evidence in this case, the land was located in Missouri at the time plaintiff acquired her deed under the Swamp Land Title Act. Notwithstanding my conclusion that the land is located in Missouri, I am convinced that under the law this court has no jurisdiction to determine that question, and it is with much reluctance that I must conclude that the Nebraska decision is res judicata and determinative of the whole question of location and ownership.

If the defendant had not litigated the subject of the location of the land and her right to the possession and ownership thereof in the Nebraska court, I think there would have been no question about the right of this court to hear and de- [fol. 201] termine that issue, but that is not the fact. The parties submitted themselves as well as their cause to that court. The question has been before the courts both state and national many times and involving many types of situations both as to individuals and property.

There is a very significant statement in the Commentaries by Mr. Justice Story quoted in *Grover & Baker Machine Co. v. Radcliffe*, 137 U. S. l. c. 296, that:

> " • • • 'no sovereignty can extend its process beyond its own territorial limits, to subject other persons or property to its judicial decisions. Every exertion of authority beyond these limits is a mere nullity, and incapable of binding such persons or property in other tribunals;' • • • 'Such is the familiar, reasonable and just principle of the law of nations; and it is scarce supposable that the framers of the Constitution designed to abrogate it between States which were to

remain as independent of each other, for all but national purposes, as they were before the revolution."

Reading this quotation from the Commentaries of a great jurist in an abstract manner might lead one to say that the principle there expressed is applicable here and would confer power upon this court to again hear and determine the question for itself. But, when we read it in connection with the many decisions on the subject, it takes on a different meaning. For example, it was said in *Baldwin* v. *Iowa State Traveling Men's Assoc.*, 283 U. S. 522 at 525, 526:

[fol. 202] " * * * The special appearance gives point to the fact that the respondent entered the Missouri court for the very purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction. (Citations omitted). It had also the right to appeal from the decision of the Missouri District Court, * * * It elected to follow neither of those courses, but, after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted.

"Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

I am not unmindful of the language of the court in *Treines* v. *Sunshine Mining Co.*, 308 U. S. 66, in which the

question of jurisdiction was extensively discussed, but I think a careful reading of that opinion clearly indicates that the question of jurisdiction was not determined in the Washington court, and that if it had been so determined, it would have been *res judicata* because the court says:

> "One trial of an issue is enough. 'The principles of *res judicata* apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties."

[fol. 203] All of the issues that are now before this court, except that of ownership by adverse possession, were tried by the Nebraska court, with all of the parties present contesting those issues, and while the question of jurisdiction of a *res* may be re-litigated by a second court, [Thompson v. Whitman, 18 Wall. 457] yet this right is limited in its application to cases where the jurisdictional point was not litigated in the first suit. *Adam* v. *Saenger*, 303 U. S. 62; *Berkman* v. *Ann Lewis Shops*, 246 F. 2d 44, 47.

Although it is my belief that the evidence clearly reveals that the land lies in Missouri, yet a trial of that very issue, with all of the parties present in the Nebraska court is now binding upon this court, and precludes it from again decreeing the ownership of the land, and that the finding and judgment must be against the plaintiff on that account only.

The defendants have filed a counterclaim asking for an accounting of the profits derived by the plaintiff as a result of use of the land. Having determined that this court is without jurisdiction to determine the question of the ownership of the property, I think this court is without jurisdiction to determine this question. However, if I were to determine the issue, I would say most definitely that the amount of money which has been expended by the plaintiff in bringing the land to a state of cultivation far exceeds the amount of profit she has derived therefrom, and that she would not be liable to the defendants for any sum.

R. M. Duncan, Judge.

Dated: January 23, 1961.

[fol. 204] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI

ST. JOSEPH DIVISION

No. 1027

---

JULIA E. DUKE, Plaintiff,

vs.

GENE DURFEE and LAURA DURFEE, husband and wife, et al., Defendants.

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ORDER CORRECTING "MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW"—Filed January 26, 1961

The "Memorandum Opinion, Findings of Fact, and Conclusions of Law" heretofore filed and entered in this cause, is hereby corrected as follows:

On page 2, line 1, the name of the defendants "Drufee" is corrected to read "Durfee".

On page 3, the citation in the last line of the fourth paragraph which reads "95 S. W. 2d 618" is corrected to read "95 N. W. 2d 618".

On page 10, in the fourth line, the letter "k" is ordered stricken.

On Page 11, the last line of the second paragraph the word "schild" is corrected to read "child".

On page 12, seventh line from the bottom after the word "land" the apostrophe is ordered stricken, and a semi-colon ordered to appear after said word "land".

Otherwise, said Memorandum Opinion, Findings of Fact and Conclusions shall remain as filed and entered.

R. M. Duncan, Judge.

[fol. 205] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI

ST. JOSEPH DIVISION

No. 1027

---

JULIA E. DUKE, Plaintiff,

vs.

GENE DURFEE and LAURA DURFEE, husband and wife, Defendants.

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DECREE—February 9, 1961

This Matter came on for trial on the 31st day of May, 1960 upon the Petition of the plaintiff and the Answer and Cross-Complaint of the defendants, Gene Durfee and Laura Durfee, and the Court, being fully advised in the premises, finds:

That plaintiff, a resident of Missouri, instituted this Suit against the defendants, Gene Durfee and Laura Durfee, in the Circuit Court of Holt County, Missouri, on May 23, 1959, alleging that she is the owner in fee simple and in possession of the following described real estate, to-wit:

Commencing 6.66 chains South and 6.96 chains East of the Quarter Section Corner between Sections Ten (10) and Eleven (11), in Township Sixty (60) North, of Range Forty (40) West; thence North 76° 35′ West 3.40 chains; thence North 84° 5′ West 3.97 chains; thence North 78° 35′ West 4.96 chains; thence North 83° 20′ West 7.65 chains; thence North 76° 35′ West 5.22 chains; thence North 82° 15′ West 4.364 chains; thence North 81° 15′ West 3.76 chains to a point 86 links South of the center of Section Ten (10), said Township and Range; thence South 32.59 chains to the left bank of the Missouri River; thence North 71° East

17.03 chains; thence North 86° East 2.82 chains; thence North 80° East 6.00 chains; thence North 75.5° East 8.48 chains; thence North 17.89 chains to the point of beginning, containing 81.65 acres, more or less.

Commencing 86 links South of the center of Section Ten (10), in Township Sixty (60) North, of Range Forty (40) West; thence North 81° 15′ West 3.27 chains; thence North 77° 45′ West 2.40 chains to the line East and West through the center of said Section Ten (10); [fol. 206] thence West 34.42 chains to the Quarter Section corner between Sections Nine (9) and Ten (10), said Township and Range; thence South 40.00 chains to the Southwest corner of said Section Ten (10); thence East 21.51 chains; thence North 73.5° East 7.53 chains; thence North 68° East 10.00 chains; thence North 71° East 2.12 chains; thence North 32.59 chains to the point of beginning, containing 153.81 acres, more or less.

Commencing at the Northwest corner of Section Fifteen (15), in Township Sixty (60) North, of Range Forty (40) West; thence East 21.51 chains; thence South 73.5° West 11.57 chains; thence South 78° West 7.45 chains; thence North 79.75° West 3.18 chains; thence North 4.21 chains to the point of beginning, containing 6.17 acres, more or less.

Commencing at the Northeast corner of Section Sixteen (16), in Township Sixty (60) North, of Range Forty (40) West; thence South 4.21 chains; thence North 79.75° West 1.67 chains; thence South 77.25° West 3.50 chains; thence South 89.25° West 2.86 chains; thence North 77.5° West 10.57 chains; thence North 81.75° West 7.40 chains; thence North 76.75° West 6.00 chains; thence East 31.41 chains to the point of beginning, containing 8.98 acres, more or less.

Commencing at the Quarter Section corner between Sections Nine (9) and Ten (10), in Township Sixty (60) North, of Range Forty (40) West; thence South 40.00 chains; thence West 31.41 chains; thence North 76.75° West 4.11 chains; thence North 64.75° West

3.59 chains; thence North 53.75° West 1.67 chains; thence North 36.53 chains to the center of Section Nine (9), said Township and Range; thence East 40.00 chains to the point of beginning, containing 158.88 acres, more or less.

Commencing at the center of Section Nine (9), in Township Sixty (60) North, of Range Forty (40) West; thence South 36.53 chains; thence North 53.75° West 5.66 chains; thence North 60.75° West 14.86 chains; thence North 57° West 11.57 chains; thence North 66° West 12.40 chains; thence North 54° West 1.78 chains; thence North 13.53 chains to the Quarter Section corner between Sections Eight (8) and Nine (9), said Township and Range; thence East 40.00 chains to the point of beginning, containing 97.70 acres, more or less.

Commencing at the Quarter Section corner between Sections Eight (8) and Nine (9), in Township Sixty (60) North, of Range Forty (40) West; thence South 13.53 chains; thence North 54° West 1.60 chains; thence North 44.25° West 17.67 chains to the Half Section line East and West through Section Eight (8), said Township and Range; thence East 13.63 chains to the point of beginning, containing 9.47 acres, more or less.

[fol. 207] Commencing at the Quarter Section corner between Sections Eight (8) and Nine (9), in Township Sixty (60) North, of Range Forty (40) West; thence West 13.63 chains; thence North 44.25° West 6.33 chains; thence North 51.25° West 10.00 chains; thence North 42.75° West 11.95 chains; thence North 12.5° West 5.21 chains; thence North 15° West 15.83 chains to the Section line between Sections Five (5) and Eight (8), said Township and Range; thence East 25.08 chains; thence South 34° 35′ East 1.84 chains; thence South 57° 30′ East 7.328 chains; thence South 59° 5′ East 4.48 chains; thence South 68° 15′ East 3.34 chains to the Section line between Sections Eight (8) and Nine (9), said Township and Range; thence South 31.02 chains to the point of beginning, containing 114.25 acres, more or less.

Commencing at the Quarter Section corner between Sections Nine (9) and Ten (10), in Township Sixty (60) North, of Range Forty (40) West; thence East 34.42 chains; thence North 77° 45′ West 4.00 chains; thence North 81° 20′ West 8.72 chains; thence North 87° 40′ West 4.45 chains; thence North 88° 3′ West 3.31 chains; thence North 81° 15′ West 1.84 chains; thence North 80° 10′ West 1.95 chains; thence North 78° 10′ West 6.35 chains; thence North 50° 00′ West 5.45 chains to the Section line between Sections Nine (9) and Ten (10), said Township and Range; thence South 7.88 chains to the point of beginning, containing 9.18 acres, more or less.

Commencing at the Quarter Section corner between Sections Nine (9) and Ten (10), in Township Sixty (60) North, of Range Forty (40) West; thence North 7.88 chains; thence North 78° 5′ West 5.87 chains; thence North 87° 15′ West 11.51 chains; thence North 84° 15′ West 10.197 chains; thence North 73° 15′ West 13.358 chains; thence South 13.95 chains to the center of Section Nine (9), said Township and Range; thence East 40.00 chains to the point of beginning, containing 41.64 acres, more or less.

Commencing at the center of Section Nine (9), in Township Sixty (60) North, of Range Forty (40) West; thence North 13.95 chains; thence North 73° 15′ West 5.63 chains; thence North 73° 25′ West 6.95 chains; thence North 67° 45′ West 8.70 chains; thence North 65° 50′ West 3.15 chains; thence North 63° 45′ West 2.63 chains; thence North 65° 35′ West 6.27 chains; thence North 68° 10′ West 7.70 chains; thence North 66° 10′ West 4.08 chains to the Section line between Eight (8) and Nine (9), said Township and Range; thence South 31.02 chains to the Quarter Section corner between Sections Eight (8) and Nine (9); thence East 40.00 chains to the point of beginning, containing 88.67 acres, more or less.

[fol. 208] and prayed for a Decree of this Court quieting said title and enjoining the defendants, Gene Durfee and

Laura Durfee, from asserting or claiming any title thereto; that the defendants, Gene Durfee and Laura Durfee, denied plaintiff's title and assert ownership thereto in themselves and alleged that said issue has been adjudicated by the District Court of Richardson County, Nebraska, which adjudication constitutes res adjudicata; said defendants further cross-complain for an accounting of profits from plaintiff for use of the land.

That the case was removed to this Court by the defendants, Gene Durfee and Laura Durfee, residents of the State of Nebraska. That this Court has jurisdiction by virtue of the non-residency of said defendants and the amount in controversy, which exceeds the sum of $10,000.00.

Upon consideration of the pleadings and the evidence, the Court finds that on or about the 11th day of November, 1956, Gene Durfee and Laura Durfee, the defendants in this action, instituted as plaintiffs, an action in the District Court of Richardson County, Nebraska, a Court of general jurisdiction, the general nature and object of said action being to try, determine and quiet the title to the real estate which was described as:

> "All that part of Sections Twenty (20), Twenty-One (21), Twenty-Two (22), Twenty-Seven (27), and Twenty-Eight (28) lying South and West of the middle of the chute formed by an old channel of the Missouri River, all in Township One (1) North, Range Eighteen (18), East of the 6th P.M., in Richardson County, Nebraska",

and that the plaintiff herein, namely, Julia E. Duke, was duly named a defendant in said action in Richardson County, Nebraska and served with process therein, and submitted herself to the jurisdiction of said District Court of Richardson County, Nebraska, and joined in the trial of the issue of whether or not the land in controversy was in the State of Missouri or in the State of Nebraska, said land as described in the Richardson County action, being the same land, but otherwise described, as the land in-
[fol. 209] volved in the action instituted by Julia E. Duke, plaintiff herein; that the said Julia E. Duke raised the issue

of the jurisdiction of the District Court of Richardson County, Nebraska to determine said cause upon the contention that said land was situated within the State of Missouri, and after hearing all of the evidence, the District Court of Richardson County, Nebraska made a general finding that the land was in Nebraska, that the plaintiffs therein, Gene Durfee and Laura Durfee, husband and wife, being the defendants herein, were the owners thereof, and that Julia E. Duke had no right, title or interest thereto; that the said Julia E. Duke prosecuted an appeal to the Supreme Court of the State of Nebraska from said determination by the District Court of Richardson County, Nebraska, and on said appeal, the Supreme Court for the State of Nebraska affirmed the action of the District Court of Richardson County, Nebraska; that said determination has become final, no further appeal being taken therefrom.

That the defendants, Gene Durfee and Laura Durfee, husband and wife, have timely raised the issue of res adjudicata, and it was stipulated at the pre-trial of this cause that the parties hereto are the same parties who were involved in the action instituted in the District Court of Richardson County, Nebraska; that the land involved in this action is the same land which was involved in the action instituted in the District Court of Richardson County, Nebraska.

That the plaintiff in this action, Julia E. Duke, specifically challenged the jurisdiction of the Nebraska Court in the Nebraska action and contended therein that said land was situated within the State of Missouri, and that the said Nebraska Court specifically determined that it had jurisdiction of the subject matter and determined that said land was situated within the State of Nebraska; that the Ne- [fol. 210] braska Court quieted the title to said land in Gene Durfee and Laura Durfee, and against the claims of the defendant therein, plaintiff herein, Julia E. Duke, and that said determination is now binding upon this Court and precludes it from redetermining the issue of ownership of said land; and that the finding and judgment must be against plaintiff herein on that account.

The Court further finds that the Cross-Complaint of the defendants, Gene Durfee and Laura Durfee, husband and wife, should be dismissed.

The Court's Memorandum Opinion, Findings of Fact and Conclusions of Law, filed herein on January 24, 1961, are made a part hereof.

It Is Therefore Ordered, Adjudged and Decreed that the Petition of the plaintiff be, and the same is hereby dismissed with prejudice.

It Is Further Ordered, Adjudged and Decreed that the Cross-Complaint of the defendants, Gene Durfee and Laura Durfee, husband and wife, be, and the same is hereby dismissed with prejudice.

It Is Further Ordered that the costs be taxed against the plaintiff and that execution issue therefor.

Richard M. Duncan, Judge.

Dated: February 9, 1961

[fol. 211] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI

ST. JOSEPH DIVISION

No. 1027

[Title omitted]

NOTICE OF APPEAL—Filed February 21, 1961

Notice is hereby given that Julia E. Duke, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the judgment entered in this action on February 10, 1961 with the exception that no appeal is taken from that part of the judgment dismissing the Cross Complaint of the defendants Gene Durfee and Laura Durfee.

John Wiltse, Wiltse & Wiltse, 1622 Stone Street, Falls City, Nebraska, Telephone: 3919.

Robt. Brown, Brown, Douglas and Brown, Tootle-Enright Nat'l Bank Bldg., St. Joseph, Missouri, Telephone: ADams 2-7749, Attorneys for Plaintiff.

February 20, 1961

Copy mailed to:

Messrs. Kranitz & Kranitz, 714½ Francis Street, St. Joseph, Missouri, Attorneys for Defendants.

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[fol. 218] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI

ST. JOSEPH DIVISION

No. 1027

[Title omitted]

ORDER EXTENDING TIME FOR APPEAL—Filed April 25, 1961

The motion of the plaintiff for an extension of time within which to perfect her appeal having been considered, the time within which to perfect her appeal is hereby extended to May 14, 1961.

R. M. Duncan, District Judge.

[fol. 329] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 330]

IN UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 16,763

Appeal from the United States District Court for the Western District of Missouri.

JULIA E. DUKE, Appellant,

v.

GENE DURFEE and LAURA DURFEE, Appellees.

No. 16,764

Appeal from the United States District Court for the Western District of Missouri.

GENE DURFEE and LAURA DURFEE, Appellants,

v.

JULIA E. DUKE, Appellee.

OPINION—September 18, 1962

Before Vogel, Blackmun and Ridge, Circuit Judges.

Blackmun, Circuit Judge.

This action is another chapter in a controversy over several hundred acres of land, once an island, in the Missouri River bottoms a short distance east and south of [fol. 331] Rulo, Nebraska, and west and south of Fortesque,

Missouri. It comes to us by way of appeals from a judgment dismissing the plaintiff's petition and the defendants' cross-complaint.

The basic factual situation is not untypical of these riverland title controversies yet the case admittedly presents not only simple and rather classical facts but issues which appear to possess some first impression aspects in the areas of conflict of laws and res judicata.

The middle of the main channel of the Missouri River forms the boundary between Nebraska and Missouri. Nebraska Enabling Act of April 19, 1864, 13 Stat. 47, § 2. Missouri Enabling Act of March 6, 1820, 3 Stat. 545, § 2, and the Missouri Constitution of 1820, Article I, as amended in 1834 by the Missouri Eighth General Assembly, and as affected by the Congressional Act of June 7, 1836, known as "The Platte Purchase", 5 Stat. 34, and the activating Presidential Proclamation of March 28, 1837. See *St. Joseph & G. I. R. R.* v. *Devereux*, C.C., D. Kansas, 1889, 41 F. 14, 15, and *Cooley* v. *Golden*, 1893, 52 Mo. App. 229, 232-3.

Near the land in question the river flows generally from west to east. At the present time the land lies on the north and east side of the river. However, prior to 1855, as disclosed by a survey of that year, the river's main channel was to the north and east of the land so that, if the channel still lay in that direction by 1867 when Nebraska was admitted to the Union, it was then clearly within the State of Nebraska. Patents covering the land were issued by the General Land Office of the United States in 1860 and filed some years later with the Register of Deeds of Richardson County, Nebraska.

[fol. 332] The plaintiff, Julia E. Duke, a citizen of Missouri, claims title to the land through a Holt County, Missouri, swamp land patent issued to her in 1946 pursuant to V.A.M.S. § 241.220. The defendants, Gene Durfee and Laura, his wife, citizens of Nebraska, claim title to the land under a Richardson County, Nebraska, sheriff's tax foreclosure sale deed issued to them in 1956 pursuant to R.R.S. Nebraska 1943, § 77-1913. Julia asserts that the land is Missouri land and is thus hers by the Missouri

patent. The Durfees assert that the land is Nebraska land and is thus theirs by the Nebraska sheriff's deed.

In 1956 the Durfees instituted an action to quiet title. This suit was brought in the District Court of Richardson County, Nebraska. Julia and her tenants were named as defendants. They appeared in the litigation. They filed an answer which, in addition to a general denial, contained an admission of possession, a claim of ownership, and an allegation that the land was in Missouri and not within the jurisdiction of the Nebraska court. Julia also testified in that proceeding. The Nebraska court found that it had jurisdiction of both the parties and the subject matter and that the land was in Nebraska, and quieted title in the Durfees as its owners. Julia and her tenants appealed to the Supreme Court of Nebraska. Inasmuch as the matter sounded in equity, that court tried the case de novo. R.R.S. Nebraska 1943, § 25-1925; *Dartmouth College* v. *Rose*, 1961, 172 Neb. 764, 112 N.W.2d 256, 265; *Heider* v. *Kautz*, 1957, 165 Neb. 649, 87 N.W.2d 226, 228. It affirmed the judgment for the Durfees. *Durfee* v. *Keiffer*, 1959, 168 Neb. 272, 95 N.W.2d 618. There was no attempt to bring the case to the Supreme Court of the United States.

In 1959 Julia instituted the present title action in the Circuit Court of Holt County, Missouri. Service on the [fol. 323] Durfees was effected by mail pursuant to V.A.M.S. § 506.160. The Durfees removed the suit to federal court. Their answer contained a general denial and asserted, as an affirmative defense, that the Nebraska proceedings were res judicata. The Durfees also filed a cross complaint alleging trespass and the harvesting of crops upon the land and seeking damages and an injunction. A petition of the State of Missouri to appear as amicus curiae was granted.

At the trial to the court the Nebraska record was introduced along with other evidence. The court wrote a memorandum in which it reviewed the applicable real property law. It concluded, contrary to the Nebraska result, that the land was in Missouri. It did so on the theory that the main channel of the river had worked its

way by accretion to the south and west; that it was off to the south and west prior to the formation of the island and land in question; and that, by the time Julia acquired her Missouri patent, the land was in that state. Despite this conclusion the district court "with much reluctance" dismissed Julia's complaint on the ground that the matter was res judicata because of the earlier resolution of the identical question by the Nebraska courts. It also dismissed the cross complaint because it felt that it must fall with the main action.

The Durfee position here is that the issue before us is simply res judicata. The Durfees claim that the Nebraska litigation in which Julia actively participated involved the same parties, the same subject matter, essentially the same evidence, and the same question for determination; that the jurisdiction issue was concededly litigated there and was decided adversely to Julia; and that the principle of res judicata applies to a jurisdictional determination as [fol. 334] well as to a non-jurisdictional one. They also point out that everyone agrees that the land was originally in Nebraska and they urge that Julia has not sustained the burden, which is hers, of showing the shifting of the Missouri River center channel, and hence the state line, to the south and west by accretion. They claim finally that their cross complaint stands on its own feet and does not fall with the main action. There is a suggestion that the Nebraska judgment is entitled to the protection and benefit of the full faith and credit clause of Article IV, § 1, of the Constitution.

Julia takes the position that the Nebraska court did not have jurisdiction of the land as subject-matter; that, even though she appeared in the Nebraska proceedings and raised and litigated the question of jurisdiction, she is not bound by the decision of the courts of that state, ~~that~~, inasmuch as it is subject-matter jurisdiction, and not jurisdiction of the person, which is here involved, the Nebraska judgment is open to collateral inquiry; that in the federal trial new additional evidence was presented; and that the federal district court, having found that the land was Missouri land, must quiet its title in Julia.

It is to be noted at the outset that this case at least appears to present a conflict between two established legal principles. The first is that

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal [fol. 335] to which he has submitted his cause." *Baldwin* v. *Iowa State Traveling Men's Association*, 1931, 283 U.S. 522, 525-6.

The second is that

> "• • • every State possesses exclusive jurisdiction and sovereignty over • • • property within its territory. • • • The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over • • • property without its territory. • • • 'Any exertion of authority of this sort beyond this limit,' says Story, 'is a mere nullity, and incapable of binding such • • • property in any other tribunals.' Story, Confl. Laws, sect. 539." *Pennoyer* v. *Neff*, 1877, 95 U.S. 714, 722-3,

and that jurisdiction over real estate outside a state's boundary cannot be conferred upon a court of the state by consent of the parties.

We first dispose of the full faith and credit suggestion. Under this constitutional clause and the implementing statute, 28 U.S.C. § 1738, each state must accord to a judgment rendered in a sister state the conclusiveness that judgment enjoys in the state of rendition. This has been described by the Supreme Court as a rule of evidence, *Wisconsin* v. *Pelican Ins. Co.*, 1888, 127 U.S. 265, 291-2, and as one making "• • • the local doctrines of *res judi-*

*cata*, speaking generally, become a part of national jurisprudence * * *". *Riley* v. *New York Trust Co.*, 1942, 315 U.S. 343, 349. It is clearly established, however, that the full faith and credit clause, while foreclosing repetitious litigation of non-jurisdictional matters, does not preclude a second forum's inquiry into questions of the first court's personal or subject-matter jurisdiction. This was the holding of several early Supreme Court cases. The principle was comprehensively restated in the usually cited [fol. 336] case of *Thompson* v. *Whitman*, 1874, 85 U.S. (18 Wall.) 457, 469, and has been perpetuated by later cases including *Grover & Baker Sewing Machine Co.* v. *Radcliffe*, 1890, 137 U.S. 287; *Adam* v. *Saenger*, 1938, 303 U.S. 59; *Milliken* v. *Meyer*, 1940, 311 U.S. 457; and *Western Union Telegraph Co.* v. *Pennsylvania*, 1961, 368 U.S. 71, 75. Thus, there is no full faith and credit requirement that, in the case before us, a Missouri court—and thereby the federal district court in Missouri, see *Angel* v. *Bullington*, 1947, 330 U.S. 183, 186-7—must accept the Nebraska judgment as final. The district court here did not violate this principle for it based its decision, not on full faith and credit, but upon res judicata.

The question of the conclusiveness of a jurisdictional determination under the res judicata principle is much more complex than the corresponding problem raised by the full faith and credit issue. To begin with, matters of personal jurisdiction and those of subject-matter jurisdiction have not received identical treatment. Thus, as to the former, where a defendant appears in the first action and litigates the question of the court's jurisdiction over his person, the ensuing judgment is held to be res judicata and not subject to collateral attack in another forum. *Chicago Life Ins. Co.* v. *Cherry*, 1917, 244 U.S. 25; *Baldwin* v. *Iowa State Traveling Men's Association*, supra, pp. 524-5 of 283 U.S. (special appearance); *American Surety Co.* v. *Baldwin*, 1932, 287 U.S. 156 (general appearance); Restatement of the Law of Judgments, § 9; Restatement of the Law of Conflict of Laws (1948 Supp.) § 451(1).[1]

[1] The result is otherwise where the judgment in the first action is obtained by default and without litigation of the issue of personal

[fol. 337] On the other hand, the answer, under the decided cases, to the parallel problem of conclusiveness of a prior determination of subject-matter jurisdiction, as distinguished from jurisdiction over the person, is not nearly so clear. The Supreme Court at different times has stated that the res judicata principle is both (a) applicable to determinations of subject-matter jurisdiction and (b) does not preclude a collateral inquiry into a court's assumption of subject-matter jurisdiction. The court's holdings disclose the same apparent inconsistency and are further clouded by generalizations going both ways. As a result the formulation of a governing rule is difficult. In order to ascertain the present status of the law we indulge in a chronological review of the Supreme Court cases:

(a) The earliest opinions of the court—concerned primarily with the disposition of real property—held or stated that the element of subject-matter jurisdiction, essential to a court's competency or power, could be inquired into collaterally. *Elliott* v. *Peirsol's Lessees*, 1828, 26 U.S. (1 Pet.) 328, 340-1; *Wilcox* v. *Jackson*, 1839, 38 U.S. (13 Pet.) 498, 511; *Hickey's Lessee* v. *Stewart*, 1845, 44 U.S. (3 How.) 750, 762-3; *Williamson* v. *Berry*, 1850, 49 U.S. (8 How.) 495, 540-3; *Boswell's Lessee* v. *Otis*, 1850, 50 U.S. (9 How.) 336. The inquiry was clearly limited to the jurisdictional question. *Thompson* v. *Tolmie*, 1829, 27 U.S. (2 Pet.) 157, 169; *Voorhees* v. *Jackson*, 1836, 35 U.S. (10 Pet.) 449, 478. This approach, by way of exception to the res judicata concept, continued apparently unquestioned until almost the end of the nineteenth century. Thus, by way of dictum, the court said in *Noble* v. *Union River Logging R. R.*, 1893, 147 U.S. 165, 173:

> "It is true that in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to [fol. 338] the validity of the proceedings, and without which the act of the court is a mere nullity; such, for

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jurisdiction. Then collateral inquiry may be made as to the first court's jurisdiction of the person of the defendant. *Baldwin* v. *Iowa State Traveling Men's Association*, *supra*, p. 525 of 283 U.S.

example, as * * * the seizure and possession of the *res* within the bailiwick in a proceeding *in rem* * * *. In these and similar cases the action of the court * * * fails for want of jurisdiction over the person or subject-matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding."

(b) Then the case of *Forsyth* v. *Hammond*, 1897, 166 U.S. 506, was decided. There, although the facts were not multi-state, the Court refers to the res judicata principle in the broadest terms. The city sought to annex the plaintiff's property which adjoined the city but was outside its limits. The plaintiff unsuccessfully appealed the trial court's approval of the annexation to the state supreme court. She then instituted a federal court injunction action. The Supreme Court held that the matter was res judicata and said, pp. 517-8 of 166 U.S.:

"But after an adverse decree she insisted that it was not only erroneous but void, and voluntarily commenced an action in the Supreme Court of the State to have the claim established. She invoked the jurisdiction of that court. She * * * there challenged the decree of the Circuit Court, challenged it for error and also for lack of jurisdiction. The questions both of error and of jurisdiction were certainly judicial in their nature and questions within the undoubted cognizance of the Supreme Court. She voluntarily sought its judgment. Can she, after its decision, be heard in any other tribunal to collaterally deny the validity thereof? Does not the principle of *res judicata* apply in all its force? Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? * * * [A] decision by a court of competent jurisdiction in respect to any essential fact or question in the one [fol. 339] action is conclusive between the parties in all subsequent actions."

The court went on to emphasize what it called "another aspect of this case", namely, that the controversy was

one peculiarly within the domain of state control, that federal court jurisdiction rested only on adverse citizenship and not on any federal constitutional right and that there was nothing in the Constitution to prevent the people of a state from giving to the courts and taking away from the legislature matters concerning the territorial boundaries of a municipal corporation.

(c) Next were two cases in which collateral inquiry was permitted. In one the attack was successful; in the other it was not.

The first was *Vallely* v. *Northern Fire & Marine Ins. Co.*, 1920, 254 U.S. 348. There a bankruptcy court had entertained an involuntary petition against the insurance company despite the fact that the Bankruptcy Act expressly excepted insurance corporations. After the time to appeal had expired the company moved to vacate the adjudication for lack of jurisdiction. The motion was sustained by the trial court. The Supreme Court, on certificate, approved, saying, p. 355-6:

> "The effect of these provisions is that there is no statute of bankruptcy as to the excepted corporations, and necessarily there is no power in the District Court to include them. In other words, the policy of the law is to leave the relation and remedies of 'municipal, railroad, insurance, or banking' corporations to their creditors and their creditors to them, to other provisions of law. It is easy to see in what disorder a different policy would result."

Policy was thus emphasized.[2]

[fol. 340] The second case was *Grubb* v. *Public Utilities Comm'n*, 1930, 281 U.S. 470. Here the State Commission had denied an applicant an operating certificate for his buses and on his appeal, with others, the highest state court had affirmed. The applicant then pursued an injunction suit he had instituted in federal court. The Commission pleaded the state judgment as a bar. Although the appeal was decided against the applicant, the Supreme Court clearly

[2] See also *Kalb* v. *Feuerstein*, 1940, 308 U.S. 433, 438, 440.

held that the question of the Commission's subject-matter jurisdiction could be raised in the collateral proceeding, saying, p. 475:

> "That the state court had jurisdiction of the parties is plain and not questioned. But the appellant does question that it had jurisdiction of the subject matter —and this although at the outset he treated that jurisdiction as subsisting and invoked its exercise. Of course, he is entitled to raise this question notwithstanding his prior inconsistent attitude, for jurisdiction of the subject matter must arise by law and not by mere consent."

The difficulty of synthesizing a rule from the decided cases at that time in the law's development was intimated by the Supreme Court itself in *Vallely* when it said, by way of comment upon the opposing arguments (i) that any litigated issue should be open only to direct attack and (ii) that courts may not act beyond the power and authority conferred upon them, p. 354 of 254 U.S.:

> "Which of the propositions shall prevail in a given case cannot be dogmatically asserted, and cases of their consideration and application can be cited against each other."

Thus, although by that time it was clear that prior determinations of subject-matter jurisdiction were sometimes open to collateral inquiry, it remained unclear as to [fol. 341] when such an inquiry would be entertained or as to what considerations would control that decision. This uncertainty was noted in the 1934 original edition of the Restatement of the Law of Conflict of Laws. After stating the rule, in § 451, that a party appearing in a proceeding will be precluded from questioning the jurisdiction of the court over his person in any subsequent proceedings in that or any other state if the court in which he appeared purported to render a judgment against him, the American Law Institute by appended caveat[3] expressly with-

[3] "The Institute expresses no opinion whether and how far a party appearing and participating in the proceedings in a court

held comment as to subject-matter jurisdiction. Subsequent Supreme Court cases, however, decided within the following seven years, provided additional guide lines.

(d) Next was the divorce case of *Davis* v. *Davis*, 1938, 305 U.S. 32. The husband sought a divorce in Virginia. His wife appeared there specially to contest Virginia's jurisdiction on the ground that their marriage domicile was in the District of Columbia. The Virginia court held that it had jurisdiction of the subject-matter because, under Virginia law, the husband had established his residence in Virginia for the required length of time. The divorce was granted. The husband then sought enforcement of this decree in the District. The wife defended on the ground that the Virginia court lacked jurisdiction. The Supreme Court held that her voluntary appearance and litigation in Virginia precluded the collateral attack. The court, in support of its conclusion, cited only *Baldwin* v. *Iowa State Traveling Men's Association*, supra, 283 U.S. 522, which had to do with jurisdiction of the person. [fol. 342] The Davis result is consistently adhered to by the Supreme Court in divorce cases and the challenges therein to subject-matter jurisdiction. See, for example, *Cook* v. *Cook*, 1951, 342 U.S. 126, and cases cited.

(e) Then followed, within eighteen months, three non-divorce cases and a supporting dictum in a fourth case to the effect that res judicata was applicable, under the facts of those cases, to the issue of subject-matter jurisdiction. The first was *Stoll* v. *Gottlieb*, 1938, 305 U.S. 165, decided two weeks after *Davis*. There, in a bankruptcy situation, the Court said, pp. 171-3:

> "Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant, or whether its geographical jurisdiction covers the place of the oc-

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of any state is precluded from subsequently questioning the jurisdiction of the court over the subject matter of the action in the courts of that state or any other state if the court in which he appeared purported to render a judgment against him."

currence under consideration. Every court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter. * * *

"* * * After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

"That a former judgment in a state court is conclusive between the parties and their privies in a federal court when entered upon an actually contested issue as to the jurisdiction of the court over the subject matter of the litigation, has been determined by this Court in *Forsyth* v. *Hammond.*" (footnotes omitted).

It sought to distinguish, pp. 175-6, but did not overrule its earlier and seemingly contrary result in *Vallely,* also [fol. 343] a bankruptcy case, not on the basis of the actual holding in *Vallely*—that the lack of jurisdiction of the subject-matter was clear and indisputable and that failure to recognize this would be violative of a paramount congressional policy—but on a ground not relied upon in *Vallely* itself, namely, that the jurisdictional question actually had not been litigated there and judgment was obtained by default.

The second was *Treinies* v. *Sunshine Mining Co.,* 1939, 308 U.S. 66. There an Idaho court had determined that an award of corporate shares by a Washington court, sitting in probate but resting its decision upon an alleged post-distribution settlement between beneficiaries, was void for lack of subject-matter jurisdiction. In the corporation's subsequent interpleader action in a federal forum the Supreme Court said, p. 78, perhaps with some inconsistency of statement:

"The power of the Idaho court to examine into the jurisdiction of the Washington court is beyond ques-

tion. Even where the decision against the validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court.

"One trial of an issue is enough. 'The principles of *res judicata* apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties." (footnotes omitted).

The third was *Chicot County Drainage Dist.* v. *Baxter State Bank*, 1940, 308 U.S. 371. Here the court held that the opportunity in the prior proceeding to raise the question of jurisdiction, although unavailed of, was sufficient to invoke the defense of res judicata. It said, p. 377, that a court "has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, [fol. 344] while open to direct review, is *res judicata* in a collateral action."

The dictum to the same general effect is in *Sunshine Anthracite Coal Co.* v. *Adkins*, 1940, 310 U.S. 381, 403.

These cases thus seem to emphasize the actual litigation, or the opportunity for litigation, of the question of subject-matter jurisdiction in the first forum. None of them involved real estate.

(f) Also in 1940, however, came the case of *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506. Here the policy factor, originally given weight in *Vallely*, again appears. The government, on behalf of Indian Nations, had filed a claim in a receivership in Missouri. The court there had entertained the debtor's cross-claim and, in the ensuing reorganization proceedings, rendered judgment on it despite the fact the government was immune from suit without its consent. No review of this judgment was sought. The government then asserted its claim in another federal court against the debtor's surety. The Supreme Court, by Mr. Justice Reed who had also written the opinions in *Gottlieb* and *Treinies*, this time refused to regard the judgment in the reorganization proceedings as a bar and said, pp. 512-4:

"No statutory authority granted jurisdiction to the Missouri Court to adjudicate a cross-claim against

the United States. The public policy which exempted the dependent as well as the dominant sovereignties from suit without consent continues this immunity even after dissolution of the tribal government. These Indian Nations are exempt from suit without Congressional authorization. * * * The desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity. * * * [T]his immunity cannot be waived by officials. * * * [fol. 345] "The reasons for the conclusion that this immunity may not be waived govern likewise the question of res judicata. As no appeal was taken from this Missouri judgment, it is subject to collateral attack only if void. * * * Consent alone gives jurisdiction to adjudge against a sovereign. * * * Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body." (footnotes omitted).

It is thus apparent that there are situations where the policy underlying nonrecognition of jurisdiction of the court whose judgment is under attack will override application of the res judicata principle. See *United States* v. *Eastport Steamship Corp.*, 2 Cir., 1958, 255 F.2d 795, 803-4.

(g) The final Supreme Court case, *Jackson* v. *Irving Trust Co.*, 1941, 311 U.S. 494, evidently gave the court no concern as to considerations of overriding policy. An action had been brought against the Alien Property Custodian. One of the defenses raised suggested that the claimants were "enemies" within the meaning of the governing act and were precluded from recovery. This issue was decided against the government. No appeal was taken. Some years later the government moved to set aside the earlier decree on the ground of lack of jurisdiction. The Supreme Court held that the prior adjudication precluded further inquiry, rejected an argument resting on governmental immunity, and said, p. 503:

"[W]hen the dismissal of the suit was asked by counsel for the Government on the ground that Sielcken

> was an enemy under the Act, the issues thus raised were the same as those which pertained to the so-called 'jurisdictional' question of right to sue * * *. However the issues were labeled the court was authorized [fol. 346] to determine them. * * * If the District Court had erred in dealing, or in failing to deal, with any issue thus involved, the remedy was by appeal and no appeal was taken."[4]

To be able to extract from this series of cases a short and simple governing rule is perhaps too much to expect. Our own analysis of these cases coincides with the comprehensive, although complex, statement propounded by the American Law Institute subsequent to the appearance of its 1934 caveat, footnote 3, supra, and in replacement of that caveat. This statement was developed and presented by the Institute in its 1942 Restatement of the Law of Judgments and in the 1948 revision of § 451 of its Conflicts Restatement. After leaving unchanged its position with respect to a prior adjudication of jurisdiction over the person (that such a determination is not open to collateral inquiry where the defendant had appeared to object to the jurisdiction), § 9 of the Judgments Restatement and § 451(1) of the Conflicts Restatement, it is said, § 10 and § 451(2), respectively:

> "Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction. Among the factors appropriate

[4] Lower court opinions on the subject over the years are numerous. Most of these repeat general rules and, in view of the Supreme Court cases which have been cited, we make no attempt to analyze them. Illustrative Eighth Circuit cases are *Foltz* v. *St. Louis & S. F. Ry.*, 1894, 60 F. 316; *Hartford Life Ins. Co.* v. *Johnson*, 1920, 268 F. 30; *Walling* v. *Miller*, 1943, 138 F.2d 629; cert. den. 321 U.S. 784; and *Mitchell* v. *Village Creek Drainage Dist.*, 1946, 158 F.2d 475. Compare *Krone* v. *Lacy*, 8 Cir., 1962, —— F.2d ——.

to be considered in determining that collateral attack should be permitted are that

[fol. 347] (a) the lack of jurisdiction over the subject matter was clear;

(b) the determination as to jurisdiction depended upon a question of law rather than of fact;

(c) the court was one of limited and not of general jurisdiction;

(d) the question of jurisdiction was not actually litigated;

(e) the policy against the court's acting beyond its jurisdiction is strong."

The Judgments Restatement contains comments interspersed with illustrations obviously based upon the Supreme Court cases cited above and the Conflicts Restatement revision makes specific reference to *Davis, Gottlieb* and *Treinies*.

We regard this as a correct statement of the law as the Supreme Court has developed it. We must then apply it to the facts presently before us.

We have a situation where land is in issue and where that land lies either in Nebraska or in Missouri. The determination of that question on the merits obviously coincides with the determination of the question of jurisdiction itself. The two courts involved are those of the adjoining states in one of which the land must lie. The Nebraska courts decided in favor of Nebraska. The Missouri federal court says it would have decided in favor of Missouri had it not felt itself bound by res judicata. With land at issue, we seem to have a factual situation of first impression.[5]

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[5] Fifty years ago the identical jurisdictional issue was raised in this court. *Whiteside* v. *Norton*, 8 Cir., 1913, 205 F. 5, cert. den. 232 U.S. 726, appeal dismissed 239 U.S. 144. The issue there concerned title to a small island which had formed in the St. Louis River where that river constitutes the boundary between Minnesota and Wisconsin. The defendant claimed that the federal circuit court for the district of Minnesota "was without jurisdiction, for

[fol. 348] It is immediately evident that none of the first four factors mentioned by the Restatements as among those appropriate for consideration on the question of collateral attack are present here: The Nebraska courts' lack of jurisdiction is not particularly clear. The dispute is almost entirely one of fact rather than of law.[6] The Nebraska courts were certainly courts of general jurisdiction. And the jurisdictional question was fully litigated.[7] This leaves among the stated factors only the fifth one resting on policy. Is there, then, a strong policy in this kind of case against a court's acting beyond its jurisdiction?

We could take the position that where four of the five stated factors are absent and where we are concerned with decisions of courts of primary jurisdiction of only those states where the land could possibly be located, and where the jurisdictional inquiry necessarily coincides with the merits, the principle of res judicata should prevail. This would amount to a recognition, as the Supreme Court ob-[fol. 349] served in *Gottlieb*, supra, p. 172 of 305 U.S., that "There is no reason to expect the second decision will be

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the reason that the land in controversy is in the state and district of Wisconsin, and therefore beyond the jurisdiction of the federal court sitting in Minnesota." This court decided the controversy on the merits and said, p. 13:

> "It is also urged that * * * because this is an action in rem, and the land in the state of Wisconsin, the Minnesota court is without jurisdiction for that reason. These contentions raise questions of serious moment; but in view of the conclusions reached upon the merits of the controversy, it is deemed unnecessary to extend this discussion further."

This court therefore came right up to the issue presently before us but was able to avoid deciding it.

[6] The parties are not in disagreement as to the law concerning the effect of accretion and avulsion upon mid-channel state boundaries. See *Nebraska* v. *Iowa*, 1892, 143 U.S. 359, 370.

[7] The Durfees place particular emphasis upon the fact that the issue of subject-matter jurisdiction was litigated in the Nebraska proceeding. This fact, although often relied upon, is not necessarily determinative. It is only one of the several factors appropriate for consideration under the Restatement rule. See Judgments Restatement, § 10, comment c.

more satisfactory than the first." There would be little legal illogic in such a holding and it would parallel the situation as to jurisdiction over the person.

We must recognize, however, that considerations of policy are present and at play in the situation before us and that it is policy which constitutes the fifth factor. We are here concerned with judicial disposition of real estate and we are here confronted with the traditional policy of immunity of a state's real property from direct disposition by a sister state's judgment.

There are Supreme Court expressions suggesting the existence of a real estate policy of this kind:

1. The earlier Supreme Court cases which refused to apply the principle of res judicata in problems of subject-matter jurisdiction and which permitted collateral inquiry were primarily real property cases. Many of these have been cited above.

2. The later Supreme Court cases which apply the barrier of res judicata do not concern real estate and strongly indicate that they were not intended to control real property situations. Thus in the bankruptcy case of *Stoll* v. *Gottlieb*, supra, the Court said, p. 176 of 305 U.S.:

> "To appraise the cases dealing with status and transfer of title to real estate seems outside the scope of the present inquiry. The rule applied here may or may not be applicable in instances where the courts with jurisdiction of the later controversy are passing upon matters of status and real estate titles."

A comparable reservation appears in *United States* v. *United States Fidelity & Guaranty Co.*, supra, where the [fol. 350] Court, in speaking of its holding in *Chicot*, and seemingly limiting it, said, p. 514 of 309 U.S.:

> "In the *Chicot County* case no inflexible rule as to collateral objection in general to judgments was declared. We explicitly limited our examination • • • No examination was made of the susceptibility to such objection of numerous groups of judgments concern-

> ing status, extra-territorial action of courts, or strictly jurisdictional and quasi-jurisdictional facts." (footnotes omitted).

Compare the language in *McCormick* v. *Sullivant*, 1825, 23 U.S. (10 Wheat.) 192, 202.

3. Certain of the cases which hold that the full faith and credit clause does not preclude collateral inquiry into subject-matter jurisdiction reveal particular fervor with respect to extra-territorial in rem judgments of state courts. See *Carpenter* v. *Strange*, 1891, 141 U.S. 87, 105-106; *Fall* v. *Eastin*, 1909, 215 U.S. 1; *Olmsted* v. *Olmsted*, 1910, 216 U.S. 386; *Hood* v. *McGehee*, 1915, 237 U.S. 611; *Grover & Baker Sewing Machine Co.* v. *Radcliffe*, supra, p. 296 of 137 U.S.; *Williams* v. *North Carolina*, 1942, 317 U.S. 287, 294, footnote 5; and *Milwaukee County* v. *M. E. White Co.*, 1935, 296 U.S. 268, 273-4.

4. Several Supreme Court dicta are significant although they were pronounced under wholly distinguishable circumstances. In *Pennoyer* v. *Neff*, supra, p. 720 of 95 U.S., the Court said:

> "The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse."

[fol. 351] In *Huntington* v. *Attrill*, 1892, 146 U.S. 657, 669, it was said:

> "Proceedings *in rem* to determine the title to land must necessarily be brought in the State within whose borders the land is situated, and whose courts and officers alone can put the party in possession."

See also the quotation, supra, from *Noble* v. *Union River Logging R. R.*, p. 173 of 147 U.S.

5. Any apparent out-of-jointedness of the older case of *Forsyth* v. *Hammond*, supra, can be explained by the absence there of a multi-state conflict and by the natural hesitation of the Court to intrude upon what it felt was a matter involving construction by state courts of a state's constitution and statutes. See pp. 518-9 of 166 U.S.

We are aware that a state itself is evidently not bound by res judicata by the results of litigation between private parties which has an indirect bearing upon the state's interest but to which the state was not a party. *United States* v. *Lee*, 1882, 106 U.S. 196; *Land* v. *Dollar*, 1947, 330 U.S. 731, 736-7. Nevertheless, we are inclined to feel that the courts of a state which is directly and adversely affected by the first forum's determination in its state's favor of the situs of land as between the two states should be able properly to inquire into the jurisdictional grounds of the first holding and should not be prevented from so doing by an immovable concept of res judicata. Of course, boundary matters, where directly contested between states themselves, fall within the original jurisdiction of the Supreme Court by Article III, § 2, of the Constitution. See *Missouri* v. *Nebraska*, 1904, 196 U.S. 23. But a state's sovereignty, the validity of its own land titles and its power to tax, can be affected, although indirectly, by proceedings of the very kind which have taken place here. [fol. 352] It seems not unreasonable or improper, therefore, as a matter of policy where land is concerned, to allow a court of the affected state the opportunity to satisfy itself as to the first forum's subject-matter jurisdiction. Permitting collateral attack does not mean that the attack is always successful. See *Grubb* v. *Public Utilities Comm'n*, supra, 281 U.S. 470. Compare *Moore* v. *Rone*, Mo. App., 1962, 355 S.W.2d 398.

After careful consideration we conclude that, for a land case such as this, a policy of careful recognition of jurisdictional limitations and of permitting inquiry into the basis of subject-matter jurisdiction outweighs any conflicting res judicata principle. We feel that, as a matter of basic legal philosophy the question of excessive judicial action by way of claimed jurisdiction over land presents a fundamental and classic situation where validity may

be a proper subject of inquiry despite opposing considerations in favor of the termination of litigation. We therefore hold that the United States District Court for the Western District of Missouri in this case had the power to make collateral inquiry as to the jurisdictional basis of the Nebraska judgment.

As we have noted, the trial court in its findings and memorandum, clearly indicated that it was its conclusion on the merits that the land was Missouri land at the time Julia Duke received her swamp land deed. Although we feel that this conclusion finds ample support in the record, we deem it advisable, rather than to reverse with specific directions, to return the entire case to the district court so that it may take such further action on the merits of the main suit and on the cross-complaint as it feels is now indicated by the results we have reached here. Of course, if Julia prevails in the main action, the cross-complaint [fol. 353] for an accounting and an injunction will necessarily be decided adversely to the Durfees.

The judgment below is therefore reversed and the case is remanded for further proceedings consistent with the views herein expressed.

[fol. 354]

IN UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

September Term, 1962

No. 16,763

Appeal from the United States District Court for the Western District of Missouri.

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JULIA E. DUKE, Appellant,

vs.

GENE DURFEE and LAURA DURFEE, husband and wife.

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No. 16,764

Appeal from the United States District Court for the Western District of Missouri.

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GENE DURFEE and LAURA DURFEE, Appellants,

vs.

JULIA E. DUKE.

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JUDGMENT—September 18, 1962

These Causes came on to be heard on the original files of the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in these causes be, and the same is hereby, reversed.

And it is further Ordered by this Court that these cases be, and the same are hereby, remanded to the said District Court for further proceedings consistent with the views expressed in the opinion of this Court this day filed herein.

September 18th, 1962.

Approved for the Court:

Robert C. Tucker, Clerk, U. S. Court of Appeals for the Eighth Circuit.

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[fol. 355]

IN UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING EN BANC AND DENYING REHEARING—October 11, 1962

There is before the Court petition of Gene Durfee and Laura Durfee, husband and wife, for rehearing en banc and on consideration of such petition, it is the order of the Court that the petition for rehearing en banc be, and it is hereby, denied.

It is further ordered that the petition for rehearing be, and it is hereby, denied.

October 11, 1962

Entered at the direction of the Court.

Robert C. Tucker, Clerk, U. S. Court of Appeals, 8th Circuit.

[fol. 356]

IN UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

September Term, 1962

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATE—October 16, 1962

On Consideration of the motion of Gene Durfee, et al., for a stay of the mandate in these causes pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for a writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the cases by the Supreme Court.

October 16th, 1962

[fol. 357] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 358]

SUPREME COURT OF THE UNITED STATES

No. 593—October Term, 1962

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GENE DURFEE, et al., Petitioners,

vs.

JULIA E. DUKE.

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ORDER ALLOWING CERTIORARI—January 7, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 14 1962
JOHN F. DAVIS, CLERK

# Supreme Court of the United States

October Term, 1962

No. 37

CIVIL

GENE DURFEE and LAURA DURFEE,

*Petitioners,*

vs.

JULIA E. DUKE,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

HAROLD W. KAUFFMAN,
730 Farm Credit Building,
Omaha 2, Nebraska,

ALFRED A. FIEDLER,
300 Keeline Building,
Omaha 2, Nebraska,

AUGUST ROSS,
1405 City Natl. Bank Building,
Omaha 2, Nebraska,

*Attorneys for Petitioners.*

Cheeks Printing Co., 1622 St. Mary's Ave., Omaha

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# Supreme Court of the United States

October Term, 1962

No. _____

CIVIL

GENE DURFEE and LAURA DURFEE,

*Petitioners,*

vs.

JULIA E. DUKE,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To: The Honorable: The Chief Justice and Associate Justices of The Supreme Court of The United States:

Your petitioners, Gene Durfee and Laura Durfee, respectfully pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Eighth Circuit entered in the above action on September 18, 1962, rehearing of which was denied on October 11, 1962.

## OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 308 F. 2d 209. A copy of such opinion is reprinted at pages 1-25 in the separate Appendix furnished herewith. The opinion of the United States District Court in this case is not reported but a copy thereof entitled "Memorandum Opinion, Findings of Fact, and Conclusions of Law" is likewise reprinted in the Appendix at pages 28-44. Also necessary to a full understanding of this case is the opinion of the Supreme Court of Nebraska in *Durfee v. Keiffer*, 168 Neb. 272, 95 N. W. 2d 618. This opinion also appears in the Appendix at pages 44-59.

## GROUNDS OF JURISDICTION

The judgment sought to be reviewed is the judgment of the United States Court of Appeals for the Eighth Circuit entered September 18, 1962. See Appendix, page 26. This judgment reversed the judgment of the United States District Court for the Western District of Missouri, St. Joseph Division.

A petition for rehearing and a request for hearing en banc were duly filed and were overruled on October 11, 1962. The order overruling the petition and request appears in the Appendix at page 27. There have been no extensions of time within which to petition for certiorari.

The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C. § 1254(1).

## QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review of this Court:

1. Where a quiet title action is brought in one state and the question of the court's jurisdiction of the subject matter, which is dependent solely upon resolution of a fact question based on conflicting evidence, is fully litigated in the trial court, and on an appeal taken by the losing claimant subject matter jurisdiction is again litigated on trial de novo in the Supreme Court of the state, is the Supreme Court's judgment entitled to full faith and credit in the courts of a sister state in a subsequent title action involving the same land brought by the losing claimant against the prevailing claimants?

> The Court of Appeals held categorically that the full faith and credit clause does not preclude a second forum's inquiry into questions of the first forum's personal or subject matter jurisdiction and did not limit the rule permitting such inquiry to cases in which the jurisdictional questions were not actually litigated in the first forum.

2. Where a quiet title action is brought in one state and the question of the court's jurisdiction of the subject matter, which is dependent solely upon resolution of a fact question based upon conflicting evidence, is fully litigated in the trial court, and on appeal taken by the losing claimant subject matter jurisdiction is again litigated on trial de novo in the Supreme Court of the state, is the Supreme Court's judgment res judicata in the courts of a sister state in a subsequent title action involving the same land

brought by the losing claimant against the prevailing claimants?

The Court of Appeals held that the doctrine of res judicata did not preclude inquiry by the second forum into the subject matter jurisdiction of the first, even though the question had been actually litigated in the trial court and again in the Supreme Court in the first case and the jurisdiction of the Supreme Court had been invoked by the losing claimant who brought the subsequent action.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional and statutory provisions:

(1) U. S. Constitution, Article IV, Section 1 (U. S. C. A. Constitution, Article IV, Section 1) which provides:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Law prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

(2) Act June 25, 1948, c. 646, 62 Stat. 947, 28 U. S. C. A., Section 1738, which provides:

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

## STATEMENT OF THE CASE

In 1956, Gene and Laura Durfee (hereinafter described as petitioners) filed in the District Court of Richardson County, Nebraska, an action against Julia E. Duke (hereinafter described as respondent) and her tenants to quiet title to certain land located in the Missouri River bottoms, which land was once an island in the river, and is now located a short distance east and south of Rulo, Nebraska, and west and south of Fortesque, Missouri.

Patents covering the land were issued by the General Land Office of the United States in 1860 and were later filed with the Register of Deeds of Richardson County, Nebraska. The petitioners claimed the land under a Richardson County, Nebraska, Sheriff's tax foreclosure sale and the respondent claimed the land through a Holt County, Missouri, swamp land patent.

The middle of the main channel in the Missouri River forms the boundary between Missouri and Nebraska and

the determination of the controversy, both on the question of jurisdiction of subject matter (whether the land was in Nebraska or Missouri) and the question of the merits (ownership of the land) depended solely upon an issue of fact, that is, whether the river changed its course by accretion or avulsion. The parties were not and are not in disagreement as to the law concerning accretion and avulsion on mid-channel state boundaries. At this point it suffices to say that if in fact the channel change involved resulted from avulsion the land remained Nebraska land and title was in the petitioners; and if from accretion, it became Missouri land and title was in respondent.

The District Court of Richardson County found the issues in favor of petitioners and quieted title in them. *Respondent* then appealed to the Supreme Court of Nebraska where on trial de novo on the record made in the District Court the Supreme Court of Nebraska affirmed the judgment. *Durfee v. Keiffer*, 168 Neb. 272, 95 N. W. 2d 618.

The Nebraska Supreme Court specifically found that the doctrine of avulsion applied, that the land was Nebraska land, that the court had jurisdiction of the subject matter of the action and that title to the land was in the petitioners.

The respondent did not seek review by this court of the judgment of the Nebraska Supreme Court. Rather, the respondent, a Missouri resident, on May 23, 1959—less than two months after the decision of the Nebraska Supreme Court—filed the instant title action in the Circuit Court of Holt County, Missouri, praying for a decree that fee simple title to the land was in her and that the peti-

tioners be forever enjoined and restrained from asserting or claiming any right, title or interest in or to any of the property.

The case was removed to the United States District Court for the Western District of Missouri, St. Joseph Division, by petitioners, who are residents of Nebraska. The United States District Court found that it had jurisdiction by virtue of the diversity of citizenship of the parties and the amount in controversy which exceeded in value the sum of $10,000.00 exclusive of interest and costs.

The United States District Court, the Honorable R. M. Duncan, Judge, held that the judgment of the Nebraska Supreme Court was res judicata and that the issues involved therein could not be relitigated by the same parties in Missouri. The court, however, said that in his opinion the decision of the Nebraska Supreme Court was erroneous and that if the question had been presented to him initially he would have found for respondent.

The respondent appealed from the judgment of the United States District Court to the United States Court of Appeals for the Eighth Circuit and that Court, sitting in division, held that the full faith and credit clause as implemented by congressional action did not apply to the case because jurisdiction of subject matter was involved. The court further held that the doctrine of res judicata did not apply.

As to res judicata, the Court of Appeals apparently thought, inasmuch as jurisdiction of the subject matter was involved, the subject matter was land, and the question was whether this border-line river land was located

in one or another of two different states, that Missouri courts were not bound by the decision of the Nebraska Supreme Court. The Court of Appeals pointed out the five factors stated in the American Law Institute's Restatement of Judgments and Restatement of Conflicts to be important to a decision on whether there was an overriding policy which would defeat the application of the doctrine of res judicata and held that the Restatement correctly stated the law as this court has developed it. The Court then found four of the five factors in favor of the petitioners but held that considerations of policy nevertheless required a decision that the United States District Court sitting in Missouri could make an independent inquiry between the same parties into the question of jurisdiction of the subject matter.

## ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF WRIT

This case presents questions of public importance concerning full faith and credit and res judicata. Petitioners urge that review by this court of the judgment of the Court of Appeals is called for primarily for three reasons:

(1) The Court of Appeals herein decided a federal question involving full faith and credit in a way which conflicts with applicable decisions of this court and those of other United States courts of appeals.

(2) The Court of Appeals herein decided a question of res judicata in a way which conflicts with applicable decisions of this court and those of other United States courts of appeals.

(3) If the Court of Appeals was correct in determining that the issues herein "appear to possess some first impression aspects in the areas of conflict of laws and res judicata" the issues are of such public importance that this court should resolve them now.

In this type of case it is difficult to avoid argument on the merits in presenting contentions supporting allowance of the writ. Petitioners will, however, limit argument to what is considered essential to the establishment that certiorari is in order. If certiorari is granted, we shall then argue fully the question of the reasoning found in the decision of the Court of Appeals and the correctness of its ultimate decision.

**Full Faith and Credit**

The Court of Appeals quickly disposed of the petitioners' contention that the judgment of the Nebraska Supreme Court in *Durfee v. Keiffer*, 168 Neb. 272, 95 N. W. 2d 618, is entitled to full faith and credit in this case. See the court's opinion, Appendix pages 6, 7. The court held:

> "It is clearly established, however, that the full faith and credit clause, while foreclosing repetitious litigation of non-jurisdictional matters, does not preclude a second forum's inquiry into questions of the first forum's personal or subject-matter jurisdiction."

Examination of the cases cited by the Court of Appeals to support the rule announced discloses that in *none of them* was the jurisdictional question actually litigated in the first court. Furthermore, the rule announced by this court in those cases *specifically limits* the application of the rule permitting a second court to make in-

dependent inquiry into the first court's jurisdiction to cases in which such jurisdiction has not been litigated by the parties who subsequently seek to attack it. Thus in *Adam v. Saenger*, 1938, 303 U. S. 59, 62, 82 L. Ed. 649, 652, 58 S. Ct. 454, 456, this court said:

> "But in a suit upon the judgment of another state the jurisdiction of the court which rendered it is open to judicial inquiry. Chicago L. Ins. Co. v. Cherry, 244 U. S. 25, 61 L. Ed. 966, 37 S. Ct. 492, and when the matter of fact or law on which jurisdiction depends *was not litigated in the original suit* it is a matter to be adjudicated in the suit founded upon the judgment. Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897." (Emphasis added).

As stated in *Davis v. Davis*, 1938, 305 U. S. 32, 39, 40, 83 L. Ed. 26, 29, 59 S. Ct. 3:

> "Art. 4, § 1, requires that judicial proceedings in each State shall be given full faith and credit in the courts of every other State. The Act of May 26, 1790, 1 Stat. at L. 122, Chap. 11, as amended, Rev. Stat. § 905, 28 U.S.C.A. § 687, declares that judicial proceedings authenticated as there provided shall have such faith and credit given to them in every 'court within the United States as they have by law or usage in the courts of the State from which they are taken.' Thus Congress rightly interpreted the clause to mean not some but full credit. Haddock v. Haddock, supra (201 U. S. 567, 50 L. Ed. 868, 26 S. Ct. 525, 5 Ann. Cas. 1). The Act extended the rule of the Constitution to all courts, Federal as well as State. Mills v. Duryee, 7 Cranch 481, 485, 3 L. Ed. 411, 413."

Again in *Williams v. North Carolina*, 325 U. S. 226, 230, 89 L. Ed. 1577, 1582, 65 S. Ct. 1092:

> "It is one thing to reopen an issue that has been settled after appropriate opportunity to present their

contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties. Forsyth v. Hammond, 166 U. S. 506, 517, 41 L. Ed. 1095, 1099, 17 S. Ct. 665, Chicago L. Ins. Co. v. Cherry, 244 U. S. 25, 30, 61 L. Ed. 966, 969, 37 S. Ct. 492, Davis v. Davis, supra."

In *Stoll v. Gottlieb*, 1938, 305, U. S. 165, 83 L. Ed. 104, 59 S. Ct. 134, this court pointed out that a former judgment in a state court is conclusive between the parties and their privies in a federal court when entered upon an actually contested issue as to the jurisdiction of the court over the subject matter of the litigation. This court referred to *Forsyth v. Hammond*, 1897, 166 U. S. 506, 41 L. Ed. 1095, 17 S. Ct. 665. We shall subsequently herein discuss the Forsyth Case, supra, in connection with the doctrine of res judicata. We note however that the case is also authority on the question of full faith and credit and is cited as supporting authority in cases which apply that doctrine to subject matter jurisdiction.

**The Doctrine of Res Judicata**

The questions of full faith and credit and res judicata overlap in this case and authorities cited to support petitioners' contentions in connection with the argument under one question generally apply in connection with the argument under the other. The prime example of this is perhaps *Forsyth v. Hammond*, 166 U. S. 506, 41 L. Ed. 1095, 17 S. Ct. 665. Although the Forsyth Case is cited by this court in cases which approach the question from the standpoint of full faith and credit and fully sustain the petitioners' position thereunder, we discuss it under the

heading of "res judicata" because the Court of Appeals did so and perhaps it will be more convenient for this court in determining whether to grant certiorari for us to follow as closely as possible and in chronological order the opinion of the Court of Appeals.

In the course of the opinion of the Court of Appeals, *Forsyth v. Hammond*, supra, is referred to but the court declined to apply its holding to this case. We submit that the Forsyth Case is as much the law today as it was when decided in 1897 and that the decision herein is in direct conflict with this court's pronouncements in Forsyth.

In the Forsyth Case respondent Caroline M. Forsyth sought by injunction in the federal court to forbid the City of Hammond, Indiana, from collecting taxes on certain land annexed to the city by an earlier state court decree. The city contended that the earlier decree was res judicata and decisive of the injunction case and the respondent contended that it was void because the enlargement of a city was a matter of legislative rather than judicial cognizance. This court upheld the contention of the city on the ground that the respondent had taken an appeal to the Supreme Court of Indiana from the earlier decree of the trial court against her in the annexation proceedings and had in that appeal attacked the validity of the decree on the ground of lack of jurisdiction. Thus at pages 517, 518 of 166 U. S., pages 1099 and 1100 of 41 L. Ed, this court said:

> "If action by the state tribunals stopped with the decree of the trial court, it might be said that the plaintiff did not voluntarily seek that forum. She was brought in by appropriate process, and compelled to there litigate the question. But after an adverse

decree she insisted that it was not only erroneous but void, and voluntarily commenced an action in the supreme court of the state to have that claim established. She invoked the jurisdiction of that court. She summoned the city of Hammond into that forum and there challenged the decree of the circuit court, challenged it for error and also for lack of jurisdiction. The questions both of error and of jurisdiction were certainly judicial in their nature and questions within the undoubted cognizance of the supreme court. She voluntarily sought its judgment. Can she, after its decision, be heard in any other tribunal to collaterally deny the validity thereof? Does not the principle of *res judicata* apply in all its force? Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? * * * The principles controlling the doctrine of *res judicata* have been so often announced, and are so universally recognized, that the citation of authorities is scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions."

In the Forsyth case as here, real property as subject matter jurisdiction was involved. There, as here, the one subsequently attacking the prior decree voluntarily sought the judgment of the appellate tribunal in the first case. The instant case is even stronger for application of res judicata for the reason that, unlike the Forsyth case, this later action is identical to the prior one, that is, both are title actions, the second having been brought solely to relitigate in another forum the same matter litigated in the first with the former defendant as the plaintiff in the subsequent action.

The decision of the Court of Appeals denying application of the doctrine of res judicata is also in conflict with such cases as *Stoll v. Gittlieb*, 1938, 305 U. S. 165, 83 L. Ed. 104, 59 S. Ct. 134; *Jackson v. Irving Trust Co.*, 1941, 311 U. S. 494, 85 L. Ed. 297, 61 S. Ct. 326; *Davis v. Davis*, 1938, 305 U. S. 32, 83 L. Ed. 26, 59 S. Ct. 3; *Treinies v. Sunshine Mining Co.*, 1939, 308 U. S. 66, 84 L. Ed. 85, 60 S. Ct. 44; and *Chicot County Drainage District v. Baxter State Bank*, 1940, 308 U. S. 371, 84 L. Ed. 329, 60 S. Ct. 317, holding that subject matter jurisdiction having once been litigated may not again be inquired into in a subsequent action between the same parties. Further the decision conflicts with the principle announced in such cases as *Baldwin v. Iowa State Traveling Men's Association*, 1931, 283 U. S. 522, 75 L. Ed. 1244, 51 S. Ct. 517 and *Chicago Life Insurance Company v. Cherry*, 1917, 244 U. S. 25, 61 L. Ed. 966, 37 S. Ct. 492, holding that where jurisdiction of the person of a defendant is actually litigated, the adjudication may not subsequently be attacked in another forum.

Evidently the Court of Appeals itself recognized that its decision in this case conflicts with *Forsyth v. Hammond*, supra, for it felt constrained to say (appendix page 23):

> "Any apparent out-of-jointedness of the older case of *Forsyth v. Hammond*, supra, can be explained by the absence there of a multi-state conflict and by the natural hesitation of the court to intrude upon what it felt was a matter involving construction by state courts of a state's constitution and statutes."

**Matters of Public Importance Involved**

The Court of Appeals based its decision on what the court considered to be a strong policy against pre-

cluding a court of an adjoining state from making an independent determination of the situs of border line land which has previously been determined in the courts of the adjoining state, though the determination is made in private litigation and cannot bind either of the two states themselves.

It is clear that neither Nebraska nor Missouri will be bound by a decision in this private litigation. The two states must settle any boundary dispute they may have by compact approved by Congress (Constitution Article I, § 10) or by litigation initiated in this court (Constitution Article III, § 2). See *Williams v. North Carolina*, 1944, 325 U. S. 226, 230, 89 L. Ed. 1577, 1582, 65 S. Ct. 1092. While the Court of Appeals recognized this fact the court concluded that a state's sovereignty, the validity of its land titles and its power to tax might "indirectly" be affected by private litigation such as this. So the court concluded that as a matter of policy where land is concerned the court of the second state should have the opportunity to satisfy itself of the first court's subject matter jurisdiction. Based upon this conclusion the Court of Appeals held (Appendix page 24):

> "After careful consideration we conclude that, for a land case such as this, a policy of careful recognition of jurisdictional limitations and of permitting inquiry into the basis of subject-matter jurisdiction outweighs any conflicting res judicata principle."

It is somewhat difficult to follow the reasoning that prompted the above conclusion. A subsequent Missouri decision holding Missouri to be the situs of the land in controversy would certainly have no more sanctity and

no more conclusiveness than the prior Nebraska decision holding Nebraska to be the situs. If the Nebraska judgment based on fully litigated factual determinations is not entitled to full faith and credit, neither would a subsequent conflicting Missouri judgment be so entitled. The two decisions, while settling nothing between the states of Nebraska and Missouri, would merely prolong the private litigation between petitioners and respondent which even now has been in court for six long years. On the other hand, a holding that the Nebraska decision is entitled to full faith and credit and that the matter once determined by the Supreme Court of Nebraska at the instance of the respondent herself is conclusive as between these parties would terminate this litigation.

As stated in *Forsyth v. Hammond*, supra, quoted in *Stoll v. Gottlieb*, 305 U. S. 165, 173, 83 L. Ed. 104, 109, 59 S. Ct. 134:

> "The question is not whether the judgment of the Supreme Court [in this case the Supreme Court of Nebraska] would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other forum".

The present case does not involve an attempt by the courts of one state to exercise authority over land clearly within the confines of another state. The Court of Appeals itself found that (Appendix page 20):

> "The Nebraska courts' lack of jurisdiction is not particularly clear".

Furthermore the Court of Appeals recognized that the dispute was one of fact rather than law and that the fact issue had been fully litigated in the Nebraska Courts.

Land controversies are common along state boundary rivers and especially along the Missouri River which forms the boundaries of Nebraska and Iowa and of Nebraska and Missouri. See for example *United States v. 171.74 Acres of Land, etc.*, 1962 D. C. Neb., 206 F. 2d 322. That case was decided on June 30, 1962, and was reported in the September 10, 1962 issue of Federal Supplement, only eight days before this decision was rendered by the Court of Appeals. In *United States v. 171.74 Acres of Land*, supra, Judge Robert Van Pelt reached a decision contrary to this one and his decision was called to the attention of the Court of Appeals in our petition for rehearing.

If there can be no finality to private litigation over purely factual questions involving the law of avulsion and accretion that results from the activities of rivers such as the mighty Missouri, it should be this court that makes such determination. If in this case full faith and credit and res judicata must yield to a policy based upon an assumed possible indirect interest of the states themselves who are not bound by the decision, it should likewise be this court that makes that declaration.

The time is ripe for the determination of the questions posed by the decision herein. Litigants should be advised whether there can be finality attributed to a decision in this type of proceeding in which subject matter jurisdiction and merits of the case depend upon the identical factual issue which has been fully litigated in the courts of one state, or whether the losing party after having invoked the jurisdiction of the highest court of the first state may ignore that decision and file another suit upon the same cause of action in a sister state.

If respondent had thought that the Nebraska courts overreached their territorial limitation in holding the land to be in Nebraska based upon conflicting evidence as to its location she should have sought relief in this court. Failing in that, she should not be permitted to attack the judgment of the Nebraska Supreme Court whose jurisdiction she herself invoked. In any event, whether this attack is proper should be determined now in the interest of justice and as an aid to prevention in the future of multiplicity of suits and useless, expensive and prolonged litigation. It is a question of such public interest that its resolution should not be postponed.

## CONCLUSION

The Court of Appeals held that the full faith and credit clause of the Constitution and the statute which extends the constitutional protection to judgments subsequently attacked in federal as well as in state courts do not apply to jurisdictional matters, even though such matters have been fully litigated. This holding is in direct conflict with decisions of this court and with the underlying reasons for the protection afforded by the full faith and credit provisions. The exception of jurisdictional matters from such protection has heretofore always been limited to questions (whether jurisdiction of the person or subject matter is involved) which have not actually been litigated between the parties. In the past if the parties have had their day in court and have actually litigated the question in the first court the decision on jurisdiction has always been accorded full faith and credit the same as other litigated issues.

Even the cases cited by the Court of Appeals to support its decision on full faith and credit disclose the limitation which the court failed to recognize. None of those cases involved actually litigated issues of jurisdiction and some of them point out this distinguishing feature and specifically limit the rule announced therein to jurisdictional matters not previously litigated by the parties.

The Court of Appeals also held that res judicata does not apply to this case. The court seemed to come to the brink of a holding that it does apply; but then the court found a "policy" which it held to take precedence over that doctrine. This holding, we submit, likewise is in conflict with many prior decisions of this court.

If, as the Court of Appeals said, this case presents "first impression aspects in the areas of conflict of laws and res judicata" this court should review the judgment of the Court of Appeals, to the end that any restriction to be ingrafted in connection with constitutional and statutory guarantees of full faith and credit and the time honored decisions of this court thereon and on the question of res judicata, be declared by the United States Supreme Court itself rather than one of the courts of appeals.

Petitioners respectfully pray that certiorari be granted to review the judgment and decision of this case.

Respectfully submitted,

HAROLD W. KAUFFMAN,

730 Farm Credit Building,
Omaha 2, Nebraska,

ALFRED A. FIEDLER,

300 Keeline Building,
Omaha 2, Nebraska,

AUGUST ROSS,

1405 City Natl. Bank Building,
Omaha 2, Nebraska,

*Attorneys for Petitioners.*

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## PROOF OF SERVICE

I, Harold W. Kauffman, one of the attorneys for petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on November 12, 1962, I served copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, together with the accompanying Appendix upon respondent by depositing the same in a United States Mailbox with first class postage prepaid, addressed to John A. Wiltse at 1622 Stone Street, Falls City, Nebraska and to Robert A. Brown, Tootle-Enright Bank Building, St. Joseph 2, Missouri, such being the post office addresses of said counsel of record for respondent.

Harold W Kauffman

HAROLD W. KAUFFMAN

730 Farm Credit Building
Omaha 2, Nebraska

*Counsel for Petitioners*

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# Supreme Court of the United States

October Term, 1962

No. [redacted] 37

CIVIL

GENE DURFEE and LAURA DURFEE,

*Petitioners,*

vs.

JULIA E. DUKE,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

HAROLD W. KAUFFMAN,
730 Farm Credit Building,
Omaha 2, Nebraska,

ALFRED A. FIEDLER,
300 Keeline Building,
Omaha 2, Nebraska,

AUGUST ROSS,
1405 City Natl. Bank Building,
Omaha 2, Nebraska,

*Attorneys for Petitioners.*

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

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## APPENDIX

# United States Court of Appeals

## FOR THE EIGHTH CIRCUIT

No. 16,763

Julia E. Duke,
*Appellant,*
vs.
Gene Durfee and Laura Durfee,
*Appellees.*

Appeal from the United States District Court for the Western District of Missouri.

No. 16,764

Gene Durfee and Laura Durfee,
*Appellants,*
vs.
Julia E. Duke,
*Appellee.*

Appeal from the United States District Court for the Western District of Missouri.

[September 18, 1902.]

Before VOGEL, BLACKMUN and RIDGE, Circuit Judges.

BLACKMUN, Circuit Judge.

This action is another chapter in a controversy over several hundred acres of land, once an island, in the Missouri River bottoms a short distance east and south of Rulo, Nebraska, and west and south of Fortesque, Mis-

souri. It comes to us by way of appeals from a judgment dismissing the plaintiff's petition and the defendants' cross-complaint.

The basic factual situation is not untypical of these riverland title controversies yet the case admittedly presents not only simple and rather classical facts but issues which appear to possess some first impression aspects in the areas of conflict of laws and res judicata.

The middle of the main channel of the Missouri River forms the boundary between Nebraska and Missouri. Nebraska Enabling Act of April 19, 1864, 13 Stat. 47, § 2. Missouri Enabling Act of March 6, 1820, 3 Stat. 545, § 2, and the Missouri Constitution of 1820, Article I, as amended in 1834 by the Missouri Eighth General Assembly, and as affected by the Congressional Act of June 7, 1836, known as "The Platte Purchase", 5 Stat. 34, and the activating Presidential Proclamation of March 28, 1837. See *St. Joseph & G. I. R. R. v. Devereux*, C.C., D. Kansas, 1889, 41 F. 14, 15, and *Cooley v. Golden*, 1893, 52 Mo. App. 229, 232-3.

Near the land in question the river flows generally from west to east. At the present time the land lies on the north and east side of the river. However, prior to 1855, as disclosed by a survey of that year, the river's main channel was to the north and east of the land so that, if the channel still lay in that direction by 1867 when Nebraska was admitted to the Union, it was then clearly within the State of Nebraska. Patents covering the land were issued by the General Land Office of the United States in 1860 and filed some years later with the Register of Deeds of Richardson County, Nebraska.

The plaintiff, Julia E. Duke, a citizen of Missouri, claims title to the land through a Holt County, Missouri, swamp land patent issued to her in 1946 pursuant to V.A.M.S. § 241.220. The defendants, Gene Durfee and Laura, his wife, citizens of Nebraska, claim title to the land under a Richardson County, Nebraska, sheriff's tax foreclosure sale deed isued to them in 1956 pursuant to R.R.S. Nebraska 1943, § 77-1913. Julia asserts that the land is Missouri land and is thus hers by the Missouri patent. The Durfees assert that the land is Nebraska land and is thus theirs by the Nebraska sheriff's deed.

In 1956 the Durfees instituted an action to quiet title. This suit was brought in the District Court of Richardson County, Nebraska. Julia and her tenants were named as defendants. They appeared in the litigation. They filed an answer which, in addition to a general denial, contained an admission of possession, a claim of ownership, and an allegation that the land was in Missouri and not within the jurisdiction of the Nebraska court. Julia also testified in that proceeding. The Nebraska court found that it had jurisdiction of both the parties and the subject matter and that the land was in Nebraska, and quieted title in the Durfees as its owners. Julia and her tenants appealed to the Supreme Court of Nebraska. Inasmuch as the matter sounded in equity, that court tried the case de novo. R.R.S. Nebraska 1943, § 25-1925: *Dartmouth College v. Rose*, 1961, 172 Neb. 764, 112 N.W. 2d 256, 265; *Heider v. Kautz*, 1957, 165 Neb. 649, 87 N.W. 2d 226, 228. It affirmed the judgment for the Durfees. *Durfee v. Keiffer*, 1959, 168 Neb. 272, 95 N.W. 2d 618. There was no attempt to bring the case to the Supreme Court of the United States.

In 1959 Julia instituted the present title action in the Circuit Court of Holt County, Missouri. Service on the Durfees was effected by mail pursuant to V. A. M. S. § 506.160. The Durfees removed the suit to federal court. Their answer contained a general denial and asserted, as an affirmative defense, that the Nebraska proceedings were res judicata. The Durfees also filed a cross complaint alleging trespess and the harvesting of crops upon the land and seeking damages and an injunction. A petition of the State of Missouri to appear as amicus curiae was granted.

At the trial to the court the Nebraska record was introduced along with other evidence. The court wrote a memorandum in which it reviewed the applicable real property law. It concluded, contrary to the Nebraska result, that the land was in Missouri. It did so on the theory that the main channel of the river had worked its way by accretion to the south and west; that it was off to the south and west prior to the formation of the island and land in question; and that, by the time Julia acquired her Missouri patent, the land was in that state. Despite this conclusion the district court "with much reluctance" dismissed Julia's complaint on the ground that the matter was res judicata because of the earlier resolution of the identical question by the Nebraska courts. It also dismissed the cross complaint because it felt that it must fall with the main action.

The Durfee position here is that the issue before us is simply res judicata. The Durfees claim that the Nebraska litigation in which Julia actively participated involved the same parties, the same subject matter, essentially the

same evidence, and the same question for determination; that the jurisdiction issue was concededly litigated there and was decided adversely to Julia; and that the principle of res judicata applies to a jurisdictional determination as well as to a non-jurisdictional one. They also point out that everyone agrees that the land was originally in Nebraska and they urge that Julia has not sustained the burden, which is hers, of showing the shifting of the Missouri River center channel, and hence the state line, to the south and west by accretion. They claim finally that their cross complaint stands on its own feet and does not fall with the main action. There is a suggestion that the Nebraska judgment is entitled to the protection and benefit of the full faith and credit clause of Article IV, § 1, of the Constitution.

Julia takes the position that the Nebraska court did not have jurisdiction of the land as subject-matter; that, even though she appeared in the Nebraska proceedings and raised and litigated the question of jurisdiction, she is not bound by the decision of the courts of that state; that, inasmuch as it is subject-matter jurisdiction, and not jurisdiction of the person, which is here involved, the Nebraska judgment is open to collateral inquiry; that in the federal trial new additional evidence was presented; and that the federal district court, having found that the land was Missouri land, must quiet its title in Julia.

It is to be noted at the outset that this case at least appears to present a conflict between two established legal principles. The first is that

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that

matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause." *Baldwin v. Iowa State Traveling Men's Association*, 1931, 283 U. S. 522, 525-6.

The second is that

> "* * * every State possesses exclusive jurisdiction and sovereignty over * * * property within its territory. * * * The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over * * * property without its territory. * * * 'Any exertion of authority of this sort beyond this limit,' says Story, 'is a mere nullity, and incapable of binding such * * * property in any other tribunals.' Story, Confl. Laws, sect. 539." *Pennoyer v. Neff*, 1877, 95 U. S. 714, 722-3,

and that jurisdiction over real estate outside a state's boundary cannot be conferred upon a court of the state by consent of the parties.

We first dispose of the full faith and credit suggestion. Under this constitutional clause and the implementing statute, 28 U.S.C. § 1738, each state must accord to a judgment rendered in a sister state the conclusiveness that judgment enjoys in the state of rendition. This has been described by the Supreme Court as a rule of evidence, *Wisconsin v. Pelican Ins. Co.*, 1888, 127 U. S. 265, 291-2, and as one making "* * * the local doctrines of *res judicata*, speaking generally, become a part of national jurisprudence * * *". *Riley v. New York Trust Co.*, 1942, 315 U. S. 343, 349. It is clearly established, however, that the

full faith and credit clause, while foreclosing repetitious litigation of non-jurisdictional matters, does not preclude a second forum's inquiry into questions of the first court's personal or subject-matter jurisdiction. This was the holding of several early Supreme Court cases. The principle was comprehensively restated in the usually cited case of *Thompson v. Whitman*, 1874, 85 U. S. (18 Wall.) 457, 469, and has been perpetuated by later cases including *Grover & Baker Sewing Machine Co. v. Radcliffe*, 1890, 137 U. S. 287; *Adam v. Saenger*, 1938, 303 U. S. 59; *Milliken v. Meyer*, 1940, 311 U. S. 457; and *Western Union Telegraph Co. v. Pennsylvania*, 1961, 368 U. S. 71, 75. Thus, there is no full faith and credit requirement that, in the case before us, a Missouri court—and thereby the federal district court in Missouri, see *Angel v. Bullington*, 1947, 330 U. S. 183, 186-7—must accept the Nebraska judgment as final. The district court here did not violate this principle for it based its decision, not on full faith and credit, but upon res judicata.

The question of the conclusiveness of a jurisdictional determination under the res judicata principle is much more complex than the corresponding problem raised by the full faith and credit issue. To begin with, matters of personal jurisdiction and those of subject-matter jurisdiction have not received identical treatment. Thus, as to the former, where a defendant appears in the first action and litigates the question of the court's jurisdiction over his person, the ensuing judgment is held to be res judicata and not subject to collateral attack in another forum. *Chicago Life Ins. Co. v. Cherry*, 1917, 244 U. S. 25; *Baldwin v. Iowa State Traveling Men's Association*, supra, pp. 524-5 of 283 U. S. (special appearance); *American Surety*

*Co. v. Baldwin*, 1932, 287 U. S. 156 (general appearance); Restatement of the Law of Judgments, § 9; Restatement of the Law of Conflict of Laws (1948 Supp.) § 451(1).[1]

On the other hand, the answer, under the decided cases, to the parallel problem of conclusiveness of a prior determination of subject-matter jurisdiction, as distinguished from jurisdiction over the person, is not nearly so clear. The Supreme Court at different times has stated that the res judicata principle is both (a) applicable to determinations of subject-matter jurisdiction and (b) does not preclude a collateral inquiry into a court's assumption of subject-matter jurisdiction. The court's holdings disclose the same apparent inconsistency and are further clouded by generalizations going both ways. As a result the formulation of a governing rule is difficult. In order to ascertain the present status of the law we indulge in a chronological review of the Supreme Court cases:

(a) The earliest opinions of the court—concerned primarily with the disposition of real property—held or stated that the element of subject-matter jurisdiction, essential to a court's competency or power, could be inquired into collaterally. *Elliott v. Peirsol's Lessees*, 1828, 26 U. S. (1 Pet.) 328, 340-1; *Wilcox v. Jackson*, 1839, 38 U. S. (13 Pet.) 498, 511; *Hickey's Lessee v. Stewart*, 1845, 44 U. S. (3 How.) 750, 762-3; *Williamson v. Berry*, 1850, 49 U. S. (8 How.) 495, 540-3; *Boswell's Lessee v. Otis*, 1850, 50 U. S. (9 How.) 336. The inquiry was clearly lim-

---

1 The result is otherwise where the judgment in the first action is obtained by default and without litigation of the issue of personal jurisdiction. Then collateral inquiry may be made as to the first court's jurisdiction of the person of the defendant. Baldwin v. Iowa State Traveling Men's Association, supra, p. 525 of 283 U. S.

ited to the jurisdictional question. *Thompson v. Tolmie*, 1829, 27 U. S. (2 Pet.) 157, 169; *Voorhees v. Jackson*, 1836, 35 U. S. (10 Pet.) 449, 478. This approach, by way of exception to the res judicata concept, continued apparently unquestioned until almost the end of the nineteenth century. Thus, by way of dictum, the court said in *Noble v. Union River Logging R. R.*, 1893, 147 U. S. 165, 173:

> "It is true that in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity; such, for example, as * * * the seizure and possession of the *res* within the bailiwick in a proceeding *in rem* * * *. In these and similar cases the action of the court * * * fails for want of jurisdiction over the person or subject-matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding."

(b) Then the case of *Forsyth v. Hammond*, 1897, 166 U. S. 506, was decided. There, although the facts were not multi-state, the Court refers to the res judicata principle in the broadest terms. The city sought to annex the plaintiff's property which adjoined the city but was outside its limits. The plaintiff unsuccessfully appealed the trial court's approval of the annexation to the state supreme court. She then instituted a federal court injunction action. The Supreme Court held that the matter was res judicata and said, pp. 517-8 of 166 U. S.:

> "But after an adverse decree she insisted that it was not only erroneous but void, and voluntarily commenced an action in the Supreme Court of the State to have the claim established. She invoked the jurisdiction of that court. She * * * there challenged the decree of the Circuit Court, challenged it for error and also for lack of jurisdiction. The questions both

> of error and of jurisdiction were certainly judicial in their nature and questions within the undoubted cognizance of the Supreme Court. She voluntarily sought its judgment. Can she, after its decision, be heard in any other tribunal to collaterally deny the validity thereof? Does not the principle of *res judicata* apply in all its force? Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? . . . [A] decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions."

The court went on to emphasize what it called "another aspect of this case", namely, that the controversy was one peculiarly within the domain of state control, that federal court jurisdiction rested only on adverse citizenship and not on any federal constitutional right and that there was nothing in the Constitution to prevent the people of a state from giving to the courts and taking away from the legislature matters concerning the territorial boundaries of a municipal corporation.

(c) Next were two cases in which collateral inquiry was permitted. In one the attack was successful; in the other it was not.

The first was *Vallely v. Northern Fire & Marine Ins. Co.*, 1920, 254 U. S. 348. There a bankruptcy court had entertained an involuntary petition against the insurance company despite the fact that the Bankruptcy Act expressly excepted insurance corporations. After the time to appeal had expired the company moved to vacate the adjudication for lack of jurisdiction. The motion was sus-

tained by the trial court. The Supreme Court, on certificate, approved, saying, pp. 355-6:

> "The effect of these provisions is that there is no statute of bankruptcy as to the excepted corporations, and necessarily there is no power in the District Court to include them. In other words, the policy of the law is to leave the relation and remedies of 'municipal, railroad, insurance, or banking' corporations to their creditors and their creditors to them, to other provisions of law. It is easy to see in what disorder a different policy would result."

Policy was thus emphasized.[2]

The second case was *Grubb v. Public Utilities Comm'n*, 1930, 281 U. S. 470. Here the State Commission had denied an applicant an operating certificate for his buses and on his appeal, with others, the highest state court had affirmed. The applicant then pursued an injunction suit he had instituted in federal court. The Commission pleaded the state judgment as a bar. Although the appeal was decided against the applicant, the Supreme Court clearly held that the question of the Commission's subject-matter jurisdiction could be raised in the collateral proceeding, saying, p. 475:

> "That the state court had jurisdiction of the parties is plain and not questioned. But the appellant does question that it had jurisdiction of the subject matter — and this although at the outset he treated that jurisdiction as subsisting and invoked its exercise. Of course, he is entitled to raise this question notwithstanding his prior inconsistent attitude, for jurisdiction of the subject matter must arise by law and not by mere consent."

---

2 See also Kalb v. Feuerstein, 1940, 308 U. S. 433, 438, 440.

The difficulty of synthesizing a rule from the decided cases at that time in the law's development was intimated by the Supreme Court itself in *Vallely* when it said, by way of comment upon the opposing arguments (i) that any litigated issue should be open only to direct attack and (ii) that courts may not act beyond the power and authority conferred upon them, p. 354 of 254 U. S.:

> "Which of the propositions shall prevail in a given case cannot be dogmatically asserted, and cases of their consideration and application can be cited against each other."

Thus, although by that time it was clear that prior determinations of subject-matter jurisdiction were sometimes open to collateral inquiry, it remained unclear as to when such an inquiry would be entertained or as to what considerations would control that decision. This uncertainty was noted in the 1934 original edition of the Restatement of the Law of Conflict of Laws. After stating the rule, in § 451, that a party appearing in a proceeding will be precluded from questioning the jurisdiction of the court over his person in any subsequent proceedings in that or any other state if the court in which he appeared purported to render a judgment against him, the American Law Institute by appended caveat[3] expressly withheld comment as to subject-matter jurisdiction. Subsequent Supreme Court cases, however, decided within the following seven years, provided additional guide lines.

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3 "The Institute expresses no opinion whether and how far a party appearing and participating in the proceedings in a court of any state is precluded from subsequently questioning the jurisdiction of the court over the subject matter of the action in the courts of that state or any other state if the court in which he appeared purported to render a judgment against him."

(d) Next was the divorce case of *Davis v. Davis*, 1938, 305 U. S. 32. The husband sought a divorce in Virginia. His wife appeared there specially to contest Virginia's jurisdiction on the ground that their marriage domicile was in the District of Columbia. The Virginia court held that it had jurisdiction of the subject-matter because, under Virginia law, the husband had established his residence in Virginia for the required length of time. The divorce was granted. The husband then sought enforcement of this decree in the District. The wife defended on the ground that the Virginia court lacked jurisdiction. The Supreme Court held that her voluntary appearance and litigation in Virginia precluded the collateral attack. The court, in support of its conclusion, cited only *Baldwin v. Iowa State Traveling Men's Association*, supra, 283 U. S. 522, which had to do with jurisdiction of the person. The Davis result is consistently adhered to by the Supreme Court in divorce cases and the challenges therein to subject-matter jurisdiction. See, for example, *Cook v. Cook*, 1951, 342 U. S. 126, and cases cited.

(e) Then followed, within eighteen months, three non-divorce cases and a supporting dictum in a fourth case to the effect that res judicata was applicable, under the facts of those cases, to the issue of subject-matter jurisdiction. The first was *Stoll v. Gottlieb*, 1938, 305 U. S. 165, decided two weeks after *Davis*. There, in a bankruptcy situation, the Court said, pp. 171-3:

> "Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant, or whether its geographical jurisdiction covers the place of the occurrence under consideration. Every court in render-

ing a judgment, tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter. • • •

"• • • After a party has his day in court, with opportunity to present his evidence and his view of the law; a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

"That a former judgment in a state court is conclusive between the parties and their privies in a federal court when entered upon an actually contested issue as to the jurisdiction of the court over the subject matter of the litigation, has been determined by this Court in *Forsyth v. Hammond.*" (footnotes omitted).

It sought to distinguish, pp. 175-6, but did not overrule its earlier and seemingly contrary result in *Vallely*, also a bankruptcy case, not on the basis of the actual holding in *Vallely*—that the lack of jurisdiction of the subject-matter was clear and indisputable and that failure to recognize this would be violative of a paramount congressional policy—but on a ground not relied upon in *Vallely* itself, namely, that the jurisdictional question actually had not been litigated there and judgment was obtained by default.

The second was *Treinies v. Sunshine Mining Co.*, 1939, 308 U. S. 66. There an Idaho court had determined that an award of corporate shares by a Washington court, sitting in probate but resting its decision upon an alleged post-distribution settlement between beneficiaries, was void for lack of subject-matter jurisdiction. In the corporation's subsequent interpleader action in a federal forum

the Supreme Court said, p. 78, perhaps with some inconsistency of statement:

> "The power of the Idaho court to examine into the jurisdiction of the Washington court is beyond question. Even where the decision against the validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court.
>
> "One trial of an issue is enough. 'The principles of *res judicata* apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties." (footnotes omitted).

The third was *Chicot County Drainage Dist. v. Baxter State Bank*, 1940, 308 U. S. 371. Here the court held that the opportunity in the prior proceeding to raise the question of jurisdiction, although unavailed of, was sufficient to invoke the defense of res judicata. It said, p. 377, that a court "has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is *res judicata* in a collateral action."

The dictum to the same general effect is in *Sunshine Anthracite Coal Co. v. Adkins*, 1940, 310 U. S. 381, 403.

These cases thus seem to emphasize the actual litigation, or the opportunity for litigation, of the question of subject-matter jurisdiction in the first forum. None of them involved real estate.

(f) Also in 1940, however, came the case of *United States v. United States Fidelity & Guaranty Co.*, 309 U. S. 506. Here the policy factor, originally given weight in *Vallely*, again appears. The government, on behalf of Indian Nations, had filed a claim in a receivership in Mis-

souri. The court there had entertained the debtor's cross-claim and, in the ensuing reorganization proceedings, rendered judgment on it despite the fact the government was immune from suit without its consent. No review of this judgment was sought. The government then asserted its claim in another federal court against the debtor's surety. The Supreme Court, by Mr. Justice Reed who had also written the opinions in *Gottlieb* and *Treinies*, this time refused to regard the judgment in the reorganization proceedings as a bar and said, pp. 512-4:

> "No statutory authority granted jurisdiction to the Missouri Court to adjudicate a cross-claim against the United States. The public policy which exempted the dependent as well as the dominant sovereignties from suit without consent continues this immunity even after dissolution of the tribal government. These Indian Nations are exempt from suit without Congressional authorization. * * * The desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity. * * * [T] his immunity cannot be waived by officials. * * *
>
> "The reasons for the conclusion that this immunity may not be waived govern likewise the question of res judicata. As no appeal was taken from this Missouri judgment, it is subject to collateral attack only if void. * * * Consent alone gives jurisdiction to adjudge against a sovereign. * * * Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body." (footnotes omitted).

It is thus apparent that there are situations where the policy underlying nonrecognition of jurisdiction of the court whose judgment is under attack will override application of the res judicata principle. See *United*

*States v. Eastport Steamship Corp.*, 2 Cir., 1958, 255 F. 2d 795, 803-4.

(g) The final Supreme Court case, *Jackson v. Irving Trust Co.*, 1941, 311 U. S. 494, evidently gave the court no concern as to considerations of overriding policy. An action had been brought against the Alien Property Custodian. One of the defenses raised suggested that the claimants were "enemies" within the meaning of the governing act and were precluded from recovery. This issue was decided against the government. No appeal was taken. Some years later the government moved to set aside the earlier decree on the ground of lack of jurisdiction. The Supreme Court held that the prior adjudication precluded further inquiry, rejected an argument resting on governmental immunity, and said, p. 503:

> "[W]hen the dismissal of the suit was asked by counsel for the Government on the ground that Sielcken was an enemy under the Act, the issues thus raised were the same as those which pertained to the so-called 'jurisdictional' question of right to sue * * *. However the issues were labeled the court was authorized to determine them. * * * If the District Court had erred in dealing, or in failing to deal, with any issue thus involved, the remedy was by appeal and no appeal was taken."[4]

To be able to extract from this series of cases a short and simple governing rule is perhaps too much to expect.

---

4 Lower court opinions on the subject over the years are numerous. Most of these repeat general rules and, in view of the Supreme Court cases which have been cited, we make no attempt to analyze them. Illustrative Eighth Circuit cases are Feltz v. St. Louis & S. F. Ry., 1894, 60 F. 316; Hartford Life Ins. Co. v. Johnson, 1920, 268 F. 30; Walling v. Miller, 1943, 138 F. 2d 629; cert. den. 321 U. S. 784; and Mitchell v. Village Creek Drainage Dist., 1946, 158 F. 2d 475. Compare Krone v. Lacy, 8 Cir., 1962, ___ F. 2d ___.

Our own analysis of these cases coincides with the comprehensive, although complex, statement propounded by the American Law Institute subsequent to the appearance of its 1934 caveat, footnote 3, supra, and in replacement of that caveat. This statement was developed and presented by the Institute in its 1942 Restatement of the Law of Judgments and in the 1948 revision of § 451 of its Conflicts Restatement. After leaving unchanged its position with respect to a prior adjudication of jurisdiction over the person (that such a determination is not open to collateral inquiry where the defendant had appeared to object to the jurisdiction), § 9 of the Judgments Restatement and § 451(1) of the Conflicts Restatement, it is said, § 10 and § 451(2), respectively:

> "Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyound its jurisdiction. Among the factors appropriate to be considered in determining that collateral attack should be permitted are that
>
> (a) the lack of jurisdiction over the subject matter was clear;
>
> (b) the determination as to jurisdiction depended upon a question of law rather than of fact;
>
> (c) the court was one of limited and not of general jurisdiction;
>
> (d) the question of jurisdiction was not actually litigated;
>
> (e) the policy against the court's acting beyond its jurisdiction is strong."

The Judgments Restatement contains comments interspersed with illustrations obviously based upon the Supreme Court cases cited above and the Conflicts Restatement revision makes specific reference to *Davis*, *Gottlieb* and *Treinies*.

We regard this as a correct statement of the law as the Supreme Court has developed it. We must then apply it to the facts presently before us.

We have a situation where land is in issue and where that land lies either in Nebraska or in Missouri. The determination of that question on the merits obviously coincides with the determination of the question of jurisdiction itself. The two courts involved are those of the adjoining states in one of which the land must lie. The Nebraska courts decided in favor of Nebraska. The Missouri federal court says it would have decided in favor of Missouri had it not felt itself bound by res judicata. With land at issue, we seem to have a factual situation of first impression.[5]

---

5 Fifty years ago the identical jurisdictional issue was raised in this court. Whiteside v. Norton, 8 Cir., 1913, 205 F. 5, cert. den. 232 U. S. 726, appeal dismissed 239 U. S. 144. The issue there concerned title to a small island which had formed in the St. Louis River where that river constitutes the boundary between Minnesota and Wisconsin. The defendant claimed that the federal circuit court for the district of Minnesota "was without jurisdiction, for the reason that the land in controversy is in the state and district of Wisconsin, and therefore beyond the jurisdiction of the federal court sitting in Minnesota." This court decided the controversy on the merits and said, p. 13:

"It is also urged that * * * because this is an action in rem, and the land in the state of Wisconsin, the Minnesota court is without jurisdiction for that reason. These contentions raise questions of serious moment: but in view of the conclusions reached upon the merits of the controversy, it is deemed unnecessary to extend this discussion further."

This court therefore came right up to the issue presently before us but was able to avoid deciding it.

It is immediately evident that none of the first four factors mentioned by the Restatements as among those appropriate for consideration on the question of collateral attack are present here: The Nebraska courts' lack of jurisdiction is not particularly clear. The dispute is almost entirely one of fact rather than of law.[6] The Nebraska courts were certainly courts of general jurisdiction. And the jurisdictional question was fully litigated.[7] This leaves among the stated factors only the fifth one resting on policy. Is there, then, a strong policy in this kind of case against a court's acting beyond its jurisdiction?

We could take the position that where four of the five stated factors are absent and where we are concerned with decisions of courts of primary jurisdiction of only those states where the land could possibly be located, and where the jurisdictional inquiry necessarily coincides with the merits, the principle of res judicata should prevail. This would amount to a recognition, as the Supreme Court observed in *Gottlieb*, supra, p. 172 of 305 U. S., that "There is no reason to expect the second decision will be more satisfactory than the first." There would be little legal illogic in such a holding and it would parallel the situation as to jurisdiction over the person.

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6 The parties are not in disagreement as to the law concerning the effect of accretion and avulsion upon mid-channel state boundaries. See Nebraska v. Iowa, 1892, 143 U. S. 359, 370.

7 The Durfees place particular emphasis upon the fact that the issue of subject-matter jurisdiction was litigated in the Nebraska proceeding. This fact, although often relied upon, is not necessarily determinative. It is only one of the several factors appropriate for consideration under the Restatement rule. See Judgments Restatement, § 10, comment c.

We must recognize, however, that considerations of policy are present and at play in the situation before us and that it is policy which constitutes the fifth factor. We are here concerned with judicial disposition of real estate and we are here confronted with the traditional policy of immunity of a state's real property from direct disposition by a sister state's judgment.

There are Supreme Court expressions suggesting the existence of a real estate policy of this kind:

1. The earlier Supreme Court cases which refused to apply the principle of res judicata in problems of subject-matter jurisdiction and which permitted collateral inquiry were primarily real property cases. Many of these have been cited above.

2. The later Supreme Court cases which apply the barrier of res judicata do not concern real estate and strongly indicate that they were not intended to control real property situations. Thus in the bankruptcy case of *Stoll v. Gottlieb*, supra, the Court said, p. 176 of 305 U. S.:

> "To appraise the cases dealing with status and transfer of title to real estate seems outside the scope of the present inquiry. The rule applied here may or may not be applicable in instances where the courts with jurisdiction of the later controversy are passing upon matters of status and real estate titles."

A comparable reservation appears in *United States v. United States Fidelity & Guaranty Co.*, supra, where the Court, in speaking of its holding in *Chicot*, and seemingly limiting it, said, p. 514 of 309 U. S.:

> "In the *Chicot County* case no inflexible rule as to collateral objection in general to judgments was de-

> cleared. We explicitly limited our examination • • •. No examination was made of the susceptibility to such objection of numerous groups of judgments concerning status, extra-territorial action of courts, or strictly jurisdictional and quasi-jurisdictional facts." (footnotes omitted).

Compare the language in *McCormick v. Sullivant*, 1825, 23 U. S. (10 Wheat.) 192, 202.

3. Certain of the cases which hold that the full faith and credit clause does not preclude collateral inquiry into subject-matter jurisdiction reveal particular fervor with respect to extra-territorial in rem judgments of state courts. See *Carpenter v. Strange*, 1891, 141 U. S. 87, 105-106; *Fall v. Eastin*, 1909, 215 U. S. 1; *Olmsted v. Olmsted*, 1910, 216 U. S. 386; *Hood v. McGehee*, 1915, 237 U. S. 611; *Grover & Baker Sewing Machine Co. v. Radcliffe*, supra, p. 296 of 137 U. S.; *Williams v. North Carolina*, 1942, 317 U. S. 287, 294, footnote 5; and *Milwaukee County v. M. E. White Co.*, 1935, 296 U. S. 268, 273-4.

4. Several Supreme Court dicta are significant although they were pronounced under wholly distinguishable circumstances. In *Pennoyer v. Neff*, supra, p. 720 of 95 U. S., the Court said:

> "The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by his court, an illegitimate assumption of power, and be resisted as mere abuse."

In *Huntington v. Attrill*, 1892, 146 U. S. 657, 669, it was said:

> "Proceedings *in rem* to determine the title to land must necessarily be brought in the State within whose borders the land is situated, and whose courts and officers alone can put the party in possession."

See also the quotation, supra, from *Noble v. Union River Logging R. R.*, p. 173 of 147 U. S.

5. Any apparent out-of-jointedness of the older case of *Forsyth v. Hammond*, supra, can be explained by the absence there of a multi-state conflict and by the natural hesitation of the Court to intrude upon what it felt was a matter involving construction by state courts of a state's constitution and statutes. See pp. 518-9 of 166 U. S.

We are aware that a state itself is evidently not bound by res judicata by the results of litigation between private parties which has an indirect bearing upon the state's interest but to which the state was not a party. *United States v. Lee*, 1882, 106 U. S. 196; *Land v. Dollar*, 1947, 330 U. S. 731, 736-7. Nevertheless, we are inclined to feel that the courts of a state which is directly and adversely affected by the first forum's determination in its state's favor of the situs of land as between the two states should be able properly to inquire into the jurisdictional grounds of the first holding and should not be prevented from so doing by an immovable concept of res judicata. Of course, boundary matters, where directly contested between states themselves, fall within the original jurisdiction of the Supreme Court by Article III, § 2, of the Constitution. See *Missouri v. Nebraska*, 1904, 196 U. S. 23. But a state's sovereignty, the validity of its own land titles and its power to tax, can be affected, although indirectly, by proceedings of the very kind which have taken place here. It seems not unreasonable or improper,

therefore, as a matter of policy where land is concerned, to allow a court of the affected state the opportunity to satisfy itself as to the first forum's subject-matter jurisdiction. Permitting collateral attack does not mean that the attack is always successful. See *Grubb v. Public Utilities Comm'n.*, supra, 281 U. S. 470. Compare *Moore v. Rone*, Mo. App., 1962, 355 S. W. 2d 398.

After careful consideration we conclude that, for a land case such as this, a policy of careful recognition of jurisdictional limitations and of permitting inquiry into the basis of subject-matter jurisdiction outweighs any conflicting res judicata principle. We feel that as a matter of basic legal philosophy the question of excessive judicial action by way of claimed jurisdiction over land presents a fundamental and classic situation where validity may be a proper subject of inquiry despite opposing considerations in favor of the termination of litigation. We therefore hold that the United States District Court for the Western District of Missouri in this case had the power to make collateral inquiry as to the jurisdictional basis of the Nebraska judgment.

As we have noted, the trial court in its findings and memorandum, clearly indicated that it was its conclusion on the merits that the land was Missouri land at the time Julia Duke received her swamp land deed. Although we feel that this conclusion finds ample support in the record, we deem it advisable, rather than to reverse with specific directions, to return the entire case to the district court so that it may take such further action on the merits of the main suit and on the cross-complaint as it feels is now indicated by the results we have reached here. Of

course, if Julia prevails in the main action, the cross-complaint for an accounting and an injunction will necessarily be decided adversely to the Durfees.

The judgment below is therefore reversed and the case is remanded for further proceedings consistent with the views herein expressed.

A true copy.

Attest:

*Clerk, U. S. Court of Appeals, Eighth Circuit.*

**JUDGMENT**

# United States Court of Appeals

## FOR THE EIGHTH CIRCUIT

**September Term, 1962**

| | |
|---|---|
| Julia E. Duke, *Appellant,* No. 16,763. vs. Gene Durfee and Laura Durfee, husband and wife. | Appeal from the United States District Court for the Western District of Missouri. |

and

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|---|---|
| Gene Durfee and Laura Durfee, *Appellants,* No. 16,764. vs. Julia E. Duke. | Appeal from the United States District Court for the Western District of Missouri. |

These Causes came on to be heard on the original files of the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in these causes be, and the same is hereby, reversed.

And it is further Ordered by this Court that these cases be, and the same are hereby, remanded to the said District Court for further proceedings consistent with the views expressed in the opinion of this Court this day filed herein.

September 18th, 1962.

# United States Court of Appeals

## FOR THE EIGHTH CIRCUIT

September Term, 1962.

| | |
|---|---|
| No. 16763<br>Julia E. Duke,<br>*Appellant,*<br>vs.<br>Gene Durfee and Laura Durfee, husband and wife. | Appeal from the United States District Court for the Western District of Missouri. |
| No. 16764<br>Gene Durfee and Laura Durfee, husband and wife,<br>*Appellants,*<br>vs.<br>Julia E. Duke. | Appeal from the United States District Court for the Western District of Missouri. |

There is before the Court petition of Gene Durfee and Laura Durfee, husband and wife, for rehearing en banc and on consideration of such petition, it is the order of the Court that the petition for rehearing en banc be, and it is hereby, denied.

It is further ordered that the petition for rehearing be, and it is hereby, denied.

October 11, 1962

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI ST. JOSEPH DIVISION**

---

JULIA E. DUKE,

*Plaintiff,*

vs.

GENE DURFEE and LAURA DURFEE, husband and wife, et al.,

*Defendants.*

No. 1027

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## MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Plaintiff, a resident of Missouri, instituted this suit against the defendants in the Circuit Court of Holt County, Missouri, on May 23, 1959, alleging that she is the owner in fee simple and in possession of the real estate described in the "Petition". (The land described by metes and bounds is quite long and consists of several hundred acres of an island in the Missouri River Bottoms, and in view of the court's determination of the case, I see no reason to set out the description here.)

The case was removed to this court by the defendants, Gene and Laura Durfee, residents of the State of Nebraska. This court has jurisdiction by virtue of non-residency of said defendants and the amount in controversy, which exceeds the sum of $10,000.00.

Plaintiff alleged that the defendants Durfee claim some right, title or interest in and to said real estate, and

that the defendants Ralph Keiffer and Russell Nauman are in possession of the property as tenants of the plaintiff; that the defendant, First State Bank of Forest City, Missouri, is the beneficiary, and defendant James H. Pettijohn is the trustee of a deed of trust, and that such parties have no interest in the litigation other than that set out herein.

Plaintiff asks the court to decree that the fee simple title is in her and that the defendants be forever enjoined and restrained from asserting or claiming any right, title or interest in or to any of said property.

Plaintiff claims ownership by virtue of a Swamp Land Patent issued to her by the State of Missouri (Holt County) under the provisions of § 241.220 R. S. Mo. 1949, in 1946.

The evidence reveals that the defendants Durfee obtained a sheriff's deed to the property as the result of a tax forclosure sale by Richardson County, Nebraska. Plaintiff also claims title by adverse possession, which will be discussed hereafter.

The main channel of the Missouri River was established as the boundary between Missouri and Nebraska at the time Nebraska was admitted to the Union.

It is the defendants' contention that the land in controversy is on the Nebraska side of the main channel of the Missouri River, and thus the property of the State of Nebraska.

In 1956, the defendants Durfee brought an action in the District Court of Richardson County, Nebraska, against Julia E. Duke and her tenants, to quiet title, al-

leging that they were the owners by virtue of the sheriff's deed, as heretofore mentioned.

The defendants in that case raised the issue of the sufficiency of the service upon them, which was overruled by that court, and they then submitted themselves to the jurisdiction of the court and joined in the trial of the issue as to whether the land in controversy was in the State of Missouri or in the State of Nebraska.

After hearing all of the evidence, the District Court made a general finding that the land was in Nebraska; that the plaintiffs were the owners thereof, and that the defendants had no right, title or interest thereto. On appeal by the defendants to the Nebraska Supreme Court, the action of the District Court was affirmed in an opinion in 95 N. W. 2d 618.

Because the District Court had not made any Findings of Fact or Conclusions of Law, the Supreme Court tried the case de novo, made its Findings of Fact and Conclusions of Law, and also arrived at the determination that the land was in the State of Nebraska.

That court fully discussed the evidence, the maps and other exhibits as a basis for its finding. There was no appeal by the defendants from the decision of the Nebraska Supreme Court to the Supreme Court of the United States. Instead the defendant there, Julia Duke, instituted this suit in the State of Missouri.

Here, the defendants raise the question of the jurisdiction of this court to hear and determine the issues, as they were determined by the Nebraska Court, and contend that the decision in the Nebraska Court is final and is entitled to full faith and credit and is res judicata.

I concur in the finding of the Nebraska court that prior to 1855, the main channel of the Missouri River flowed to the north and east of the location of the land in question here. The survey of 1855-56 shows that the main channel of the River had moved west and south of its location prior to that time, but was still east and north of the land in question.

In 1877 a railroad bridge was built across the river above the land that is now in question. The open span of the bridge was near the right bank or the Nebraska side of the river. An extended dike was constructed on the left side or the Missouri side of the river, leading to the bridge.

It is contended, and I think it is true, that this work had the effect of shifting the main channel of the river to the west and south. It is probable that it was in this area that islands began to form and grow by accretion, and it was the islands and the land thus created that plaintiff testifies she remembers in the early '20s. At least by 1930, they had grown sufficiently that one Slagle in 1932 laid claim to them by virtue of a quit claim deed.

The Nebraska court found that at that time there was a defined channel west and south of the island. That court however, found that the main channel of the river continued its course along what is now the old chute.

Slagle built a cabin on the island, fenced part of it and apparently ran some livestock on it, and continued in possession until about 1943, and paid taxes to Richardson County, Nebraska. It was shortly after Slagle obtained possession of it (probably 1933-34) that the Gov-

ernment began its channel control work. Thereafter, as a result of this work, the channel of the river was moved to the west and south.

Apparently it was upon these facts that the Nebraska court determined that the change in the course of the river resulted from avulsion rather than from attrition or accretion.

In arriving at its conclusion, the Supreme Court of Nebraska in syllabus 7 which was written by the court, l. c. 620 of its opinion, said:

> "The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto."

At page 624 of its opinion, that court stated:

> "We are here dealing with an island that formed in the river west of the main channel of the river when it ran where the chute now is. That island grew by processes of accretion and finally by reliction. The boundary of the mainland and that of the island meet at the thread of the old chute."

Considering the court's own statement, I think it must be assumed that prior to the cutting of what is referred to as the "new chute and channel" the main channel of the river was to the west of the island formation.

I am unable to find any evidence in the case that is convincing to me that the chute was the result of the gradual change of the course of the river. To me, the most convincing evidence is that the chute which was formed in the early '20s, was the result of avulsion occa-

sioned by the accumulation of ice which suddenly cut a new channel, but I do not believe the evidence shows that this new chute or channel became the main channel of the river.

Following the course of the river from 1846 to the period prior to the cutting of the channel, I find no evidence of the formation of a new channel by avulsion, unless it was the chute referred to above. If the channel was the result of avulsion, as it is my conclusion it was, and if the main channel prior thereto was west of the formation of the island, then, of course, the property lines did not change nor did the boundary between Nebraska and Missouri change.

The question of ownership by adverse possession was not raised by the defendants in the Nebraska District Court, but was raised in the Supreme Court. That court held that it was bound to determine the case upon the same issues that were presented to the District Court, and, therefore, refused to consider the question of adverse possession.

In arriving at its conclusion, the Supreme Court of Nebraska found:

> "Prior to 1855, the main channel of the Missouri River flowed some distance to the north and east of the location of the land in question. The 1855-1856 survey shows that the main channel of the river had moved west and south, but was still east and north of the land in question. The evidence is ample that thereafter the main channel of the river for many years was along the course of the 'old chute' to which witnesses refer and to which the trial court referred in its decree.

"About 1887 a railroad bridge was built across the river a short distance above the area in question. The open span was near the right bank of the river. An extended dike led to the bridge on the left side of the river. The construction of the bridge had the effect of shifting the main channel of the river to the west and south. Sand bars and shallow water appeared to the east and north of the new channel and west and south of the former main channel. The land involved here began as an island in that area. It grew by accretion.

"At least by 1930, it was sufficiently established to be claimed by a person who quitclaimed it to a Mr. Slagle in 1932. At that time there was a defined channel west and south of the island. However, the evidence of eyewitnesses is that the main channel of the river continued its course along what is now the 'old chute'.

"Mr. Slagle had a cabin on the island, fenced parts of it and kept livestock on it, and had an employee on it at times. He continued in possession of it until 1943, and paid taxes to Richardson County, on it until 1944. In 1933 or 1934 the United States government began the work of channel control on the river. In the next few years as a result of that work the main channel of the river was moved to the west and south. As a result of silting in times of flood the island increased by accretion.

"In 1943 or 1944, defendant entered upon the island from the old left bank across the old chute, burned grass and underbrush, built a fence along the chute, and undertook to do some plowing. When the river was in high water stage, water flowed through the old channel where the chute now is located. Recurring annual floods prevented much development until 1954 or 1955 when over 200 acres of land were cleared by defendant and put to crops.

"If the river shifted by avulsion from its first position to the main channel as it was and where the

chute now is, that shift would avail defendant nothing for the boundary between the states would remain where it was before the avulsion. If, however, that moving of the channel to the west and south was by accretion, it would avail the defendant nothing for the land here involved is not accreted land to the old left bank of the river.

"We are here dealing with an island that formed in the river west of the main channel of the river when it ran where the chute now is. That island grew by processes of accretion and finally by reliction. The boundary of the mainland and that of the island meet at the thread of the old chute.

"The left bank of the river did not move west and south by accretions to the river bank. Rather, as a result of the works of man and the forces of the water, the river established a new main channel to the west and south of the island.

"The question is: Is the island in Missouri or Nebraska?

"The effect of the trial court's finding is that it is in Nebraska.

"We think it patent that we cannot apply the rule of accretion to the changed course of the stream. Rather it is a situation to which the rule of avulsion applies."

The question of res judicata was timely raised by the defendants by Motions to Dismiss in this court, and were by this court overruled before the case came on for trial.

It is plaintiff's contention that the question of jurisdiction may be raised at any time, and that the factual situation as to whether or not the land is actually in Nebraska or Missouri would determine the question of the jurisdiction of this court regardless of any Findings

of Fact or Conclusions of Law reached by the Nebraska courts in the former trial.

At the time the Motion to Dismiss was determined by the court, it was felt that the whole matter should be presented to the court so that it could make such decision as it felt necessary to a full and complete determination both of the question of jurisdiction and the question of fact.

The decisions of the state and national courts involving the title to lands along the Missouri River and islands therein, are so numerous that they fill many volumes. Such questions are always troublesome to the courts, although the principles of law involved are well settled.

Before it was subdued, the Missouri River was the greatest outlaw the West has ever known. It was as nomadic as the tribes that lived along its banks and gave it its name. It was no respecter of persons or property. It often took from those who had and gave to those who had not; it often took from the poor and gave to the well-to-do.

When we attempt to determine where the channel was from year to year prior to the period when the channel stabilization program began, we must rely upon the memory of man to a very large degree, and, of course, the memory of man is often faulty and fades with time, and no two pairs of eyes see the same thing in the same way, although they may be equally honest in their attempt to describe that which actually exists.

Islands are formed in the Missouri River during one high water period and taken away in another. They are

moved from one place to another, sometimes slowly, sometimes over night. Land and islands may be created by accretion, by avulsion or by attrition. There is no dispute about the legal principle that when the river suddenly changes its channel or its course, the property lines existing prior thereto are not affected, and that includes the boundaries between these states. If the main channel of the river changes by attrition or as the result of erosion, the boundary follows the course of the river.

It was not until the Corps of Engineers of the United States Army began the work of controlling the channel of the Missouri River for navigation purposes and later for flood control purposes, that its course had any stability. Since that time it has reasonably been confined within the areas charted by the engineers.

The history of the land in question goes back to as early as 1916, when the father of the plaintiff first acquired the land of which the land in question is now a part. Plaintiff testified that her father had acquired a part of the land in 1916 by purchase; that she remembered in the early '20s that there was land south and west of her father's land; that as a child she remembered having walked out on that land.

A portion of a cottonwood tree was introduced in evidence at the time of this case, which the plaintiff testifies was cut on the land in controversy in 1959. The state forester of Missouri testified that the tree was at least 35 years old, which indicated that the land, at least some portion of it, had existed with sufficient permanency to support the growth of shrubbery and trees for that many years. Plaintiff further testifies that her father

from time to time had livestock on a portion of the land in controversy.

Plaintiff remembers when the chute was formed in the mid-'20s. She says the river cut-through was caused by an ice gorge. She remembers her father's attempt to stabilize the bank of the river at the place where the chute cut through. She further testifies that as a result of the cutting through, approximately 100 acres of her father's land was cut away, because thereafter that amount was removed from the tax rolls in Holt County, Missouri.

To me, the evidence clearly reveals that prior to the cut-through and the formation of the chute, the main channel was to the south and west of the land in controversy.

Some time in the early '30s the Government began its work of stabilizing the Missouri River by placing revetments and whatever other types of engineering devices the particular nature and character of the work required. These dikes started on the Missouri side of the river and extended through the plaintiff's land, and plaintiff says to the main channel of the river. Thereafter there was a gradual closing of the chute.

In 1943, the plaintiff began to use a portion of the land, she caused a portion of it to be burned off and a portion of it was cultivated, but it was not until 1946 that she acquired the deed which has heretofore been described. In 1946, she bought a bulldozer and started building a crossing across the chute. From year to year thereafter plaintiff continued to put forth such effort as the season would permit, to bring additional portions of the land under cultivation.

Naturally, the extent of the high water would determine the extent she was able to carry on these activities. The nature of the season and the extent of the high water would also determine the rapidity with which the chute was filled up. Whether or not this chute was ever the main channel of the river, is, of course, the principle question in this controversy.

Assuming that prior to the cutting of the chute the main channel and the boundary line between the states were to the south and west of the land in controversy, the sudden cutting of the chute, even if it created a new main channel, would not have changed the line, because it was by avulsion and did not affect property lines.

It is a matter of common knowledge among those who have lived along the river, that islands rise from season to season, and may shift from season to season, depending upon the amount of high water, and, as one of the expert witnesses expressed it, the result of numerous "flows" or "currents" which may not constitute the main channel of the river.

The evidence revealed that there are many currents and cross-currents in the Missouri River, but not necessarily are such currents or cross-currents the main channel of the river. They do, however, materially affect the development and the building of islands and the cutting of minor chutes through an island. At one season of the year there may be a chute through an island, and at another season and after a period of high water the chute may have completely disappeared. As the island increases in size and height and vegetation begins to grow upon it, it gathers more sediment, mud and silt, thus becoming more secure and develops with much greater rapidity.

Certainly if the area which constituted the chute was the main channel and was caused to fill up gradually because of the building of the revetments by the Army Engineers, it did not suddenly change its course. Whether or not the river changes its channel gradually or suddenly as the result of the engineering efforts of men, does not affect property rights or the line between the states. If the channel of the river was caused to move slowly because of the revetments, the property lines would follow it. If it was caused to move suddenly, they would not follow it.

I have carefully reviewed the evidence that was introduced in the Nebraska court and in this court, including the two experts who have had much experience in construction work on the Missouri River, and I am convinced that the evidence clearly shows that prior to the formation of the island in controversy, the main channel of the river was to the south and west thereof.

With due respect to the learned gentlemen on the Nebraska courts for whom I have the most profound respect, I am unable to agree with them that the chute became the main channel. But, if it did become the main channel, it was by avulsion and did not affect the boundary line.

There is no contention in this case that the land formerly acquired by the plaintiff's father and now belonging to her mother, is on the Nebraska side of the river, and if that is true, it is difficult for me to understand how, under all the evidence, that the land in controversy is, or was at the time the issue was determined by that court, in Nebraska.

During a long period of time both states apparently exercised jurisdiction over the land; the prosecuting attorneys of both states exercised jurisdiction over it; the alleged Nebraska owners did not exercise any supervision or occupancy of the land from the late '30s or early '40s until this suit was brought in 1959, and plaintiff was in unquestioned, undisputed possession of the land from 1943 until the present time.

It is my definite conclusion that under all the evidence in this case, the land was located in Missouri at the time plaintiff acquired her deed under the Swamp Land Title Act. Notwithstanding my conclusion that the land is located in Missouri, I am convinced that under the law this court has no jurisdiction to determine that question, and it is with much reluctance that I must conclude that the Nebraska decision is res judicata and determinative of the whole question of location and ownership.

If the defendant had not litigated the subject of the location of the land and her right to the possession and ownership thereof in the Nebraska court, I think there would have been no question about the right of this court to hear and determine that issue, but that is not the fact. The parties submitted themselves as well as their cause to that court. The question has been before the courts both state and national many times and involving many types of situations both as to individuals and property.

There is a very significant statement in the Commentaries by Mr. Justice Story quoted in *Grover & Baker Machine Co. v. Radcliffe*, 137 U. S. l. c. 296, that:

"* * * 'no sovereignty can extend its process beyond its own territorial limits, to subject other persons or

property to its judicial decisions. Every exertion of authority beyond these limits is a mere nullity, and incapable of binding such persons or property in other tribunals;' * * * 'Such is the familiar, reasonable and just principle of the law of nations; and it is scarce supposable that the framers of the Constitution designed to abrogate it between States which were to remain as independent of each other, for all but national purposes, as they were before the revolution.''

Reading this quotation from the Commentaries of a great jurist in an abstract manner might lead one to say that the principle there expressed is applicable here and would confer power upon this court to again hear and determine the question for itself. But, when we read it in connection with the many decisions on the subject, it takes on a different meaning. For example, it was said in *Baldwin v. Iowa State Traveling Men's Assoc.*, 283 U. S. 522 at 525, 526:

"* * * The special appearance gives point to the fact that the respondent entered the Missouri court for the very purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction. (Citations omitted.) It had also the right to appeal from the decision of the Missouri District Court, * * *. It elected to follow neither of those courses, but, after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted.

"Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that

> matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

I am not unmindful of the language of the court in *Treines v. Sunshine Mining Co.*, 308 U. S. 66, in which the question of jurisdiction was extensively discussed, but I think a careful reading of that opinion clearly indicates that the question of jurisdiction was not determined in the Washington court, and that if it had been so determined, it would have been *res judicata* because the court says:

> "One trial of an issue is enough. 'The principles of *res judicata* apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties."

All of the issues that are now before this court, except that of ownership by adverse possession, were tried by the Nebraska court, with all of the parties present contesting those issues, and while the question of jurisdiction of a *res* may be relitigated by a second court (Thompson v. Whitman, 18 Wall. 457), yet this right is limited in its application to cases where the jurisdictional point was not litigated in the first suit. *Adam v. Saenger*, 303 U. S. 62; *Berkman v. Ann Lewis Shops*, 246 F. 2d 44, 47.

Although it is my belief that the evidence clearly reveals that the land lies in Missouri, yet a trial of that very issue with all of the parties present in the Nebraska court is now binding upon this court, and precludes it from again decreeing the ownership of the land, and that

the finding and judgment must be against the plaintiff on that account only.

The defendants have filed a counterclaim asking for an accounting of the profits derived by the plaintiff as a result of use of the land. Having determined that this court is without jurisdiction to determine the question of the ownership of the property, I think this court is without jurisdiction to determine this question. However, if I were to determine the issue, I would say most definitely that the amount of money which has been expended by the plaintiff in bringing the land to a state of cultivation far exceeds the amount of profit she has derived therefrom, and that she would not be liable to the defendants for any sum.

R. M. DUNCAN, *Judge*.

Dated: January 23, 1961.

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GENE DURFEE, ET. AL.,

*Appellees*,

vs.

RALPH KEIFFER, ET AL.,

*Appellants*.

95 N. W. 2d 618.

Filed March 27, 1959. No. 34523.

APPEAL from the district court for Richardson County: VIRGIL FALLOON, JUDGE. *Affirmed*.

*Pettijohn & Eiser* and *Wiltse & Wiltse*, for appellants.

*Ross & O'Connor* and *Alfred A. Fiedler*, for appellees.

Heard before SIMMONS, C. J., CARTER, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

This is an action to quiet title to land. As originally brought it involved a claim to land lying on both sides of an old chute in the Missouri River. At the area involved the Missouri River runs generally in an east and west direction. The land lying east and north of the chute appears to have been owned by defendant Nellie N. Duke, she having a life estate, with remainder in three children. The land lying south and west of the chute was claimed by the defendant, Julia E. Duke.

Issues were made and trial was had resulting in a decree that plaintiffs were the owners of the land involved lying south and west of the middle of the chute. Defendants appeal. There is no cross-appeal by plaintiffs. Hence the appeal here involves only the lands claimed by defendant Julia E. Duke. We, then, consider it as an appeal in an action brought against defendant Julia E. Duke, hereinafter called defendant, and her tenants.

Plaintiffs alleged in their petition the ownership of the land; that they were owners under and by virtue of a deed executed and delivered as the result of a tax foreclosure proceeding in Richardson County; that the land was situated wholly in the State of Nebraska; that it was west of the meander line of the middle of the channel of the Missouri River as established by a United States government survey in 1855-1856; that the Missouri River by avulsion in 1916 changed its course to its present channel west and south of the land involved; and that the boundary between the states remained as it existed at the time of the 1855-1856 survey.

Defendants answered and alleged that the lands were wholly in the State of Missouri and not within the jurisdiction of the court. They then denied generally, admitted possession, and claimed ownership. They prayed for a dismissal of the plaintiffs' petition.

At the trial defendant testified that she based her claim of title on a swamp land patent from the State of Missouri.

On appeal here defendant argues that she proved ownership by adverse possession. Plaintiffs contend that such a claim must be affirmatively pleaded and cannot now be raised. It does not appear that such a contention was advanced to the trial court. Defendant's testimony negatives it. Claim of ownership by adverse possession is advanced here for the first time.

The rule is: This court will dispose of a case on appeal on the theory on which it was presented to the trial court by the parties. See O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123.

This cause is here for trial de novo subject to the rule that: In equity cases when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. See Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393.

Both parties here introduced a large number of aerial photographs, maps, and charts of the area where the land in dispute is located. The record is replete with

the testimony of witnesses who referred to locations of land, buildings, fences, dikes, streams, etc., by general statements of "here" and "there," and "indicated" to the trial court the reference to the location they were testifying about. In many instances we are unable to determine with any degree of certainty to what they refer, and in some instances even the exhibits mentioned cannot be identified. Trial courts should not permit a record to be made of testimony referring to exhibits without requiring counsel and witnesses to identify for the record that about which they testify. Where such a record is made we have no recourse but to apply the above equity rule, and do so here.

It is advisable at this point to state the rules of law that are to be considered here. The parties here are not in disagreement that the boundary between Missouri and Nebraska at the time of the admission of the states to the Union was the center of the channel of the Missouri River. We have held: "That boundary may and does fluctuate with the changes of the channel of that stream where the alteration is gradual and imperceptible; but, when by a sudden variation the stream seeks and marks for itself an entirely new course and abandons the old path, the boundary remains along the line which constituted the center of the old channel.'" Lienmann v. County of Sarpy, 145 Neb. 382, 16 N. W. 2d 725.

"Where the main channel of the river changes by accretion and decretion, the boundary between the two states follows the channel. * * * Where the main channel of the river changes by avulsion to a new course, the boundary does not change but becomes fixed along the

line which constituted the center of the old channel. * * * Land cuts off from the mainland of a state by avulsion do not change their status but remain a part of the state from which they were cut off." Lienmann v. County of Sarpy, *supra*.

"Land uncovered by a gradual subsidence of water is not an accretion, but a reliction. The same law applies to both these forms of addition to real estate which are held to be the property of the abutting landowner. * * * Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of the surface level from any cause. * * * Where by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner. * * * The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto. * * * Where the accretion commences with the shore of the island and afterward extends to the mainland, or any distance short thereof, all the accretion belongs to the owner of the island; but, where accretions to the island and to the mainland eventually meet, the owner of each owns the accretions to the line of contact," Burket v. Krimlofski, 167 Neb. 45, 91 N. W. 2d 57.

"Avulsion is the sudden and rapid change in the course and channel of a boundary river. In Nebraska v. Iowa, 143 U. S. 359, 12 S. Ct. 396, it was said: 'It is

equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion.'" Conkey v. Knudsen, 143 Neb. 5, 8 N. W. 2d 538.

We here refer to the banks of the Missouri River as the left bank and as the right bank, as they appear looking downstream.

We find the following factual situation from the record.

During annual flood periods the river ran over a wide area in the location in question. At normal and low water flow it followed a fairly well defined main channel.

Prior to 1855, the main channel of the Missouri River flowed some distance to the north and east of the location of the land in question. The 1855-1856 survey shows that the main channel of the river had moved west and south, but was still east and north of the land in question. The evidence is ample that thereafter the main channel of the river for many years was along the course of the "old chute" to which witnesses refer and to which the trial court referred in its decree.

About 1887 a railroad bridge was built across the river a short distance above the area in question. The open span was near the right bank of the river. An extended dike led to the bridge on the left side of the river. The construction of the bridge had the effect of shifting

the main channel of the river to the west and south. Sand bars and shallow water appeared to the east and north of the new channel and west and south of the former main channel. The land involved here began as an island in that area. It grew by accretion.

At least by 1930, it was sufficiently established to be claimed by a person who quitclaimed it to a Mr. Slagle in 1932. At that time there was a defined channel west and south of the island. However, the evidence of eye-witnesses is that the main channel of the river continued its course along what is now the "old chute."

Mr. Slagle had a cabin on the island, fenced parts of it and kept livestock on it, and had an employee on it at times. He continued in possession of it until 1943, and paid taxes to Richardson County on it until 1944. In 1933 or 1934 the United States government began the work of channel control on the river. In the next few years as a result of that work the main channel of the river was moved to the west and south. As a result of silting in times of flood the island increased by accretion.

In 1943 or 1944, defendant entered upon the island from the old left bank across the old chute, burned grass and underbrush, built a fence along the chute, and undertook to do some plowing. When the river was in high water stage, water flowed through the old channel where the chute now is located. Recurring annual floods prevented much development until 1954 or 1955 when over 200 acres of land were cleared by defendant and put to crops.

If the river shifted by avulsion from its first position to the main channel as it was and where the chute now is, that shift would avail defendant nothing for the boun-

dary between the states would remain where it was before the avulsion. If, however, that moving of the channel to the west and south was by accretion, it would avail the defendant nothing for the land here involved is not accreted land to the old left bank of the river.

We are here dealing with an island that formed in the river west of the main channel of the river when it ran where the chute now is. That island grew by processes of accretion and finally by reliction. The boundary of the mainland and that of the island meet at the thread of the old chute.

The left bank of the river did not move west and south by accretions to the river bank. Rather, as a result of the works of man and the forces of the water, the river established a new main channel to the west and south of the island.

The question is: Is the island in Missouri or Nebraska?

The effect of the trial court's finding is that it is in Nebraska.

We think it patent that we cannot apply the rule of accretion to the changed course of the stream. Rather it is a situation to which the rule of avulsion applies.

In Whiteside v. Norton, 205 F. 5, 45 L. R. A. N. S. 112, the court was presented with a similar fact situation and held that the cutting of a new channel was analogous to avulsion.

In James v. State, 10 Ga. App. 13, 72 S. E. 600, the court had a somewhat similar problem to solve. The court

held that there was no evidence of a change "by the sudden and violent process of avulsion," yet the act of the United States government in changing the course of a river to improve navigation was analogous to a change caused by avulsion and not by accretion, and that the boundary line was not affected.

In State v. Eklund, 147 Neb. 508, 23 N. W. 2d 782, we had a quite similar set of facts and decided this precise question by applying the rule of avulsion. We quoted with approval this language from Commissioners v. United States, 270 F. 110: "'* * * where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream.'"

The above decision is controlling here. We hold that the land involved in this appeal, lying south and west of the old chute, is within the State of Nebraska; that the trial court had jurisdiction of the cause; and that defend-

ant's swamp land patent from the State of Missouri conveyed no title to her.

This decision is not to be construed as deciding in any way the jurisdictional location of the land east and north of the old chute, as that land is not involved in this action as it comes to us here.

Defendant, assuming that we might find that the land involved is in the State of Nebraska, relies on the rule that: Plaintiff in an action to quiet title has the burden of proof and he must recover upon the strength of his title and not because of any weakness in the title of his adversary. See Stratbucker v. Junge, 153 Neb. 885, 46 N. W. 2d 486. She contends that plaintiffs have not met their burden of proof.

Defendant here contends that the sheriff's deed under which plaintiffs claim title was void.

It is not claimed by defendant that there was any residence on the land where service at the usual place of residence could have been had. It is not claimed that defendant was a resident of Nebraska. In fact the evidence shows that she was a resident of Missouri. It is not claimed that there was anything of record in Richardson County that showed the defendant had or claimed any title or interest in this land.

The foreclosure action named the Slagles as defendants. It named John Doe and Mary Doe and all persons having or claiming to have any interest in any part of the described real estate. As to John Doe and Mary Doe the sheriff's return showed that they were not found in Richardson County.

Defendant's claim rests upon that part of section 25-321, R. R. S. 1943, regarding service upon unknown defendants which provides: "Judgments and decrees against persons so designated and made defendants and served by publication as herein provided shall be conclusive as against all persons who are not in actual possession of such property and whose ownership of, interest in, rights or title to, or lien upon such property does not appear of record in or by their respective names in the county wherein such property is situated."

Defendant contends that she was in "actual possession" and hence entitled to the protection of the act. Defendant makes no charge of irregularities in the proceedings other than the above.

It is to be remembered that when defendant entered upon the land in 1943 or 1944, to the limited extent shown, she entered as a trespasser. After 1946, she claimed under and by virtue of the Missouri land patent. She made no claim to a right of possession otherwise.

The petition of foreclosure was filed August 23, 1955. The sheriff made return of service on August 26, 1955. The decree was rendered on December 15, 1955. The sale was confirmed and the deed to plaintiffs issued and recorded on February 24, 1956.

The question, then, relates to defendant's claim of possession during the above period.

As to that the evidence is extremely meager. The evidence is that there were 220 acres of growing crops on the land in 1955. Defendant testifies that she was in "possession," and received no summons or notice of the

foreclosure proceedings. The nearest she comes to defining her possession is to refer to "the land I was supposed to be in the operation of."

A Mr. Keiffer testified that he started farming for defendant on this land in 1954; that "I had about 200 acres" and a good crop growing there in August 1955; and that he was not served with summons. A Mr. Nauman testified that in 1955 he "worked" for Mr. Keiffer. No one undertook to testify as to the nature of the arrangements whereby Keiffer farmed for defendant. In her brief here defendant refers to Keiffer and Nauman as "her tenants." Whether that relates to the time of the tax foreclosure action or the time the instant action was started is not certain.

Neither Keiffer nor Nauman is named as defendant in the tax foreclosure action. They are named as defendants in the instant action brought in November 1956, as parties in possession of a part of the premises. Their answer filed jointly with the Dukes admits possession and alleges ownership in the Dukes. Neither Keiffer nor Nauman is here claiming any invasion of his rights. The contention here is solely that of the defendant.

We find nothing in the record that even suggests that there was anyone resident on the land or even working on the land when this action began upon whom service of summons could be had. The sheriff's return, which imports verity, negatives any such a conclusion. There is no suggestion that anyone going to the land could have found anyone or anything there that would have suggested where inquiry could be made to determine

who, if anyone, claimed any interest in the land. In fact there is no evidence as to where the defendant or her "tenants" were during the period here involved. They make no showing that they were on the land, or in the area of the land, or were either in the State of Missouri or State of Nebraska.

The defendant's position rests solely on the fact that Mr. Keiffer farmed the land for her and that there were over 200 acres of growing crops thereon.

Does that establish "actual possession" within the contemplation of the statute? What did the Legislature intend when it used the term "actual possession"?

In Parsons v. Prudential Real Estate Co., 86 Neb. 271, 125 N. W. 521, 44 L. R. A. N. S. 666, where the tax laws required service of notice upon "every person in actual occupancy of" the lands, an attack was made on a tax deed upon the ground that one Parker was in "actual occupancy" of the premises and that no notice was served on him. Parker was a trespasser and did not live on the land, but cropped the ground. We accepted the following definition: "'Occupant' * * * 'One who occupies; an inhabitant; especially, one in actual possession, as a tenant, who has actual possession, in distinction from the landlord, who has legal or constructive possession.'" We held that Parker was not an actual occupant of the land.

That decision was filed March 10, 1910. The part of the statute here involved was enacted in 1921. See Laws 1921, c. 226, § 1, p. 815. So we had defined the term before the Legislature adopted it.

The rule is: It is to be presumed that the Legislature in using language in a statute gave to it the signifi-

cance that had been previously accorded to it by the pronouncements of this court unless a different meaning has been provided by the context of the statute. See Gomez v. State ex rel. Larez, 157 Neb. 738, 61 N. W. 2d 345.

We adhered to the above definition in Quist v. Duda, 159 Neb. 393, 67 N. W. 2d 481.

We construed Parsons v. Prudential Real Estate Co., *supra*, in Kuska v. Kubat, 147 Neb. 139, 22 N. W. 2d 484. The court said: "In that case service of notice to redeem was given to nonresidents only by publication, as in the case at bar. At that time there was a person in actual possession or occupancy of the property but he was a trespasser. No personal service of notice to redeem was had upon him. This court held that none was necessary. In construing the Constitution and applicable statute, it was held that 'occupants' and 'actual possession or occupancy' were synonymous and meant actual, open, visible possession or occupancy in fact, exactly that and nothing less, as distinguished from constructive possession. It was also held that the actual possession or occupancy must be by one claiming an interest in the property either in privity with or adversely to the owner as distinguished from a mere trespasser."

Defendant relies here on Harris v. Heeter, 137 Neb. 905, 291 N. W. 721, 128 A. L. R. 111. There we merely applied the rule of actual possession to the facts. The facts of that case are so dissimilar to the facts here that no comment is required.

It necessarily follows that defendant's attack upon plaintiffs' title by the tax deed has no merit.

We arrive at the same conclusion by another line of reasoning.

It will be noted that section 25-321, R. R. S. 1943, in summary requires an allegation in the petition or other pleading that there are persons who claim to have some interest in the property; that it does not appear of record; that diligent investigation and inquiry have been made; and that the person in whose behalf the investigation has been made does not know the names, whereabouts, or residence of such persons. Section 25-518, R. R. S. 1943, requires an affidavit supporting the allegation. Section 25-517, R. R. S. 1943, requires a court order for service by publication after the court is satisfied that sufficient investigation has been made. It is obvious that such a procedure was intended to establish a "conclusive" record in accord with the facts shown and established to the satisfaction of the court, as against all persons except those "in actual possession" (§ 25-321, R. R. S. 1943), whose interest in the property does not appear of record.

In Draper v. Taylor, 58 Neb. 787, 79 N. W. 709, we stated this rule: Possession of land is notice to the world of the possessor's rights therein.

This holding was followed in Blum v. Voss, 139 Neb. 233, 297 N. W. 84, and Blum v. Poppenhagen, 142 Neb. 5, 5 N. W. 2d 99.

There is a companion rule stated in Talich v. Marvel, 115 Neb. 255, 212 N. W. 540, followed in Marshall v. Rowe, 126 Neb. 817, 254 N. W. 480, and Hollenbeck v. Guardian Nat. Life Ins. Co., 144 Neb. 684, 14 N. W. 2d 330, which is: Where one is put upon inquiry, he is to

be charged with notice of all such facts as he would have learned by reasonable inquiry.

It must be assumed that the Legislature had these rules in mind in making the requirements of allegations, proof by affidavit, and court finding and order.

It is obvious that what the Legislature intended was that a party against whom such service by publication had been had, could, by proof of actual possession at the time involved, disprove the truth of the showing upon which the court had permitted the service by publication to be made. The Legislature limited that right to strict compliance with proof of actual possession in the literal meaning of those words. It did not permit the opening up of the conclusive effect of the service by publication except upon a showing of that condition in fact. The showing here is patently insufficient to meet this test.

Defendant advances a further contention based upon the following from Maryland v. West Virginia, 217 U. S. 1, 30 S. Ct. 268, 54 L. Ed. 645: "Where possession of territory has been undisturbed for many years a prescriptive right arises which is equally binding under the principles of justice on States and individuals."

There again the facts are so dissimilar that we see no reason for discussing the case here.

The judgment of the trial court is affirmed.

AFFIRMED.

MESSMORE, J., participating on briefs.

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. [redacted] 37

CIVIL.

GENE DURFEE and LAURA DURFEE,
*Petitioners,*

vs.

JULIA E. DUKE,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

R. A. BROWN,
Tootle-Enright Bank Building,
St. Joseph 2, Missouri,
*Attorney for Respondent.*

B. L. MIDWESTERN, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

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GENE DURFEE and LAURA DURFEE,
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vs.

JULIA E. DUKE,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Julia E. Duke, respectfully suggests that the petition for a writ of certiorari does not present a situation which calls for the issuance of such a writ, and respectfully requests that the petition for the writ be denied.

## ADDITIONAL STATEMENT OF THE CASE.

The evidence in this case shows that respondent and her father before her were on a portion of the land in question, using it for agricultural purposes and clearing it in the early nineteen hundred twenties. By the nineteen hundred forties respondent had cleared a portion of the land and was farming it more extensively. In 1946 respondent secured a deed under appropriate statutes from Holt County, Missouri. She thereafter continued to occupy the land, clear it and farm it, and paid taxes upon it.

Petitioners did not appear in the picture until 1956, at which time they secured a tax deed from Richardson County, Nebraska. Petitioners do not have a clear chain of title stemming from an original patent, and there is no pretense that such a chain of title exists.

Petitioners, therefore, base their claim entirely on a Sheriff's Deed, and petitioners have never been in possession of the property, or any portion of it.

## ARGUMENT AMPLIFYING REASONS WHY WRIT SHOULD NOT BE ALLOWED.

The opinion by Judge Blackmun from the Eighth Circuit Court of Appeals appearing at pages one to twenty-five of petitioners' appendix, answers fully and completely each and every argument now advanced by petitioners. With one exception that opinion discusses each and every case now presented by petitioners. It carefully analyzed each such case, gave it such weight as it deserved, and placed it in its proper category. It is perhaps presumptuous to attempt to improve in any way upon that opinion, but a few comments by way of explanation do seem proper.

## Full Faith and Credit.

Petitioners rely upon five opinions in arguing that the full faith and credit clause was violated by the Blackmun opinion. Each and every one of these cases was carefully discussed by Judge Blackmun and put in its proper place. The first of these is *Adam* v. *Saenger*, 1938, 303 U.S. 59, 62, 82 L. Ed. 649, 652, 58 S. Ct. 454. Petitioners read into the decision in that case a conclusion which quite obviously is not there. The court said:

> "In a suit upon the judgment of another State the jurisdiction of the court which rendered it is open to judicial inquiry".

It further said:

> "When the matter of fact or law upon which jurisdiction depends was not litigated in the original suit, it is a matter to be adjudicated in the suit founded upon the judgment."

Petitioners argue that there, therefore, must be implied a third finding that if jurisdiction was considered in the first trial it cannot be inquired into again. The opinion does not say that, nor intimate it. It simply says that the inquiry is always open, and must be gone into if not gone into in the first instance. The Blackmun opinion points out that *Adam* v. *Saenger* does not preclude a second forum's inquiry into the question of the first court's jurisdiction of the subject matter.

Petitioners secondly cite *Davis* v. *Davis*, 1938, 305 U.S. 32, 83 L. Ed. 26, 59 S. Ct. 3. This was a divorce case, and as pointed out by Judge Blackmun, is adhered to in divorce cases and the challenges therein to subject matter jurisdiction. It has no application to the question of jurisdiction of real property in other States.

Petitioners' third case is *Williams* v. *North Carolina*, 1944, 325 U.S. 226, 228, 229, 89 L. Ed. 1577, 1580, 1581, 65 S. Ct. 1092. This case does not, as we read it, enunciate the rule which petitioners seek to draw from it. It specifically says:

> "*Thompson* v. *Whitman* made it clear that the doctrine of *Mills* v. *Duryee* comes into operation only when, in the language of Kent, 'the jurisdiction of the court in another State is not impeached, either as to the subject matter or the person'. Only then is 'the record of the judgment * * * entitled to full faith and credit'."

It is further stated:

> "A judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment."

The first head note states:

> "The full faith and credit clause operates only with respect to judgments rendered by a court whose jurisdiction, either as to the subject matter or person, is not impeached."

The Blackmun opinion has very carefully considered this case, and has shown that it is not an authority to support petitioners' position.

In the fourth place petitioners rely upon *Stoll* v. *Gottlieb*, 1938, 305 U.S. 165, 176, 83 L. Ed. 104, 111, 59 S. Ct. 134. This was a bankruptcy case. It had nothing to do with real estate. The opinion itself indicates that this decision had no application to real property situations. It was said in that opinion, as Judge Blackmun has pointed out,

> "To appraise the cases dealing with status and transfer of title to real estate seems outside the scope

> of the present inquiry. The rule applied here may or may not be applicable in instances where the courts with jurisdiction of the later controversy are passing upon matters of status and real estate titles."

Petitioners' last case is *Forsyth* v. *Hammond*, 1897, 166 U.S. 506, 41 L. Ed. 1095, 17 S. Ct. 635. This case did not deal with multi-State questions. There was a trial in the State's trial court and an appeal to the State Supreme Court. A Federal Court injunction action was then instituted. This in no way involved the jurisdiction of another State, and Judge Blackmun has very aptly pointed out that this opinion is easily explained, and is not pertinent to our question.

The basic pronouncement which we believe is controlling is in *Thompson* v. *Whitman*, 1874, 85 U.S. (18 Wall.) 457, 21 L. Ed. 897, 899, where the court said:

> "As to a foreign judgment, it is perfectly well settled that the inquiry is always open, whether the court by which it was rendered had jurisdiction of the person or of the thing."

This was also discussed in *Milliken* v. *Meyer*, 1940, 311 U.S. 457, 462, 85 L. Ed. 278, 282, 61 S. Ct. 339, when the court said:

> "Where a judgment rendered in one State is challenged in another, a want of jurisdiction over either the person or the subject matter, is, of course, open to inquiry."

**The Doctrine of Res Judicata.**

In arguing that the doctrine of *res judicata* should apply, petitioners rely upon eight cases. Again, each and every case cited by petitioners was considered by Judge Blackmun, and carefully analyzed.

Petitioners' first case is *Forsyth* v. *Hammond, supra.* This has already been discussed. All of the issues were in the courts of one State, and the case has nothing whatsoever to do with an attack upon the jurisdiction of a court of another State.

The second case was *Stoll* v. *Gottleib, supra.* This case, as we pointed out, was a bankruptcy matter, and again has been discussed both by Judge Blackmun and in the present brief, and has been shown to be not controlling.

Petitioners' third case is *Jackson* v. *Irving Trust Company,* 1941, 311 U.S. 494, 85 L. Ed. 297, 61 S. Ct. 326. All of the litigation involved there took place in one State. The opinion caused Judge Blackmun no concern, and we believe it requires no further comment. It does not adjudicate the question presented at this time.

The next case relied upon by petitioners was *Davis* v. *Davis, supra.* This has been previously discussed; it is a divorce case and it is not applicable.

*Treinies* v. *Sunshine Mining Company,* 1939, 308 U.S. 66, 78, 84 L. Ed. 85, 93, 60 S. Ct. 44, is petitioners' next case. Strangely enough in that case an Idaho court held that a Washington court's judgment was void for lack of subject matter jurisdiction. The court said:

> "The power of the Idaho court to examine into the jurisdiction of the Washington court is beyond question."

This opinion was carefully discussed by Judge Blackmun.

Next we come to *Chicot County Drainage District* v. *Baxter State Bank,* 1940, 308 U.S. 371, 84 L. Ed. 329, 60 S. Ct. 317. This opinion clearly is of limited application, as was the opinion in the bankruptcy case of *Stoll* v. *Gott-*

*leib, supra.* In *United States* v. *United States Fidelity and Guaranty Company*, 1940, 309 U.S. 506, 514, 84 L. Ed. 894, 899, 900, 60 S. Ct. 653, the court in speaking of its opinion in the *Chicot* case, said:

> "In the Chicot County case no inflexible rule as to collateral objection in general to judgments was declared. We explicitly limited our examination * * *. No examination was made of the susceptibility to such objection of numerous groups of judgments concerning status, extraterritorial action of courts, or strictly jurisdictional and quasi-jurisdictional facts."

Petitioners' next case is *Baldwin* v. *Iowa State Traveling Men's Association*, 1931, 283 U.S. 522, 75 L. Ed. 1244, 51 S. Ct. 517. This case had to do with jurisdiction of the person only. It had nothing to do with real property jurisdiction.

Petitioners' last case is *Chicago Life Insurance Company* v. *Cherry*, 1917, 244 U.S. 25, 61 L. Ed. 966, 37 S. Ct. 492. This again, as Judge Blackmun pointed out, concerned jurisdiction of the person, wherein the court's jurisdiction over the person was litigated in the first instance, and was thus held to be *res judicata* at a later date. It again had nothing to do with jurisdiction of real property.

In addition to *Thompson* v. *Whitman, supra,* and *Milliken* v. *Meyer, supra,* the court may examine *Grover and Baker Machine Company* v. *Radcliffe*, 1890, 137 U.S. 287, 34 L. Ed. 670, 672, 11 S. Ct. 92, wherein the court quoted Mr. Justice Story in his Commentaries as follows:

> "No sovereignty can extend its process beyond its own territorial limits, to subject other persons or right of property to its judicial decisions. Every exertion of authority beyond these limits is a mere nullity, and incapable of binding such persons or property in other tribunals; * * * Such is the familiar, reasonable and

just principle of the law of nations; and it is scarce supposable that the framers of the Constitution designed to abrogate it between States which were to remain as independent of each other for all but national purposes, as they were before the Revolution."

Again in *Grubb* v. *Public Utilities Commission*, 1930, 281 U.S. 470, 475, 74 L. Ed. 972, 977, 50 S. Ct. 374, the court said:

> "The case in the State Court was so far identical with the suit in the Federal Court as respects subject matter and parties that there can be no doubt that the judgment in the former, unless invalidated by some jurisdictional infirmity, operated to bar the further prosecution of the latter. That the State court had jurisdiction of the parties is plain and not questioned. But the appellant does question that it had jurisdiction of the subject matter—and this although at the outset he treated that jurisdiction as subsisting and invoked its exercise. Of course, he is entitled to raise this question notwithstanding his prior inconsistent attitude, for jurisdiction of the subject matter must arise by law and not by mere consent."

**Matters of Public Importance Involved.**

Petitioners next purport to argue the public importance of the matters involved, but spend most of their time arguing that the decision of the Eighth Circuit Court binds neither Nebraska nor Missouri, and settles nothing. Only one case is cited there which has not been previously discussed. It is *United States* v. *171.74 Acres of Land, etc.*, and the citation is given as 206 F.2d 322. This apparently is a misprint, because the correct citation is 1962, 266 F. Supp. 322, 324, and the case as we read it is clearly in opposition to the position taken by petitioners. This litigation started when a petition was filed to register a judgment of the District Court of Iowa. At the trial in Ne-

braska the Nebraska court held the Iowa judgment void because Iowa had no jurisdiction over the land, since it was in Nebraska, and

> "Therefore, the Iowa judgment was not entitled to full faith and credit or to registration as a foreign judgment." (l.c. 324).

This judgment was affirmed by the Nebraska Supreme Court. An attack was then made on the judgment in the Federal District Court in Nebraska, and as the court said:

> "This evidence is clearly an attempt to relitigate the exact issues determined by the Courts of Nebraska. Whether this may properly be done is the key issue for the court to decide". (l.c. 324).

Without attempting to quote the very many pertinent statements made in this decision, it points out quite sharply that there could be no further litigation in the Nebraska courts because Nebraska had already litigated the subject matter. The opinion agreed that Nebraska examined the jurisdiction of the Iowa court, found Iowa did not have jurisdiction of the subject matter, and thus refused full faith and credit to the Iowa judgment. The court did, however, make a very pertinent statement which answers the argument advanced by petitioners that the decision of the Eighth Circuit Court answers nothing. The court said, at l.c. 325:

> "Where a court of one State denies effect of a judgment of another State on the ground of absence of jurisdiction, although there had been a finding of the presence of such jurisdiction in a contested proceeding in the latter State, and the former judgment is not reversed on appeal, it has been held that the latter judgment of the former will be given effect as *res judicata*."

In further quoting from Section 10(e) of the Restatement of Judgment, it said:

> "Thus, if in the first action the court determines that it has jurisdiction over the subject matter, but in a second action between the parties the court determines that the court in the first action had no jurisdiction over the subject matter, then in a third action between the parties the court is bound by the determination in the second action."

The answer is that there will be no confusion if the opinion of the Eighth Circuit Court is allowed to stand, because it is the second and binding opinion, and it will finally and conclusively determine the issues.

As to the question of public importance, it is of the utmost importance that each State should be allowed to determine its own jurisdiction of land alleged to be within its confines. This is fundamental, and was clearly enunciated in *Grover and Baker Machine Company* v. *Radcliffe, supra.*

## IN CONCLUSION.

The Blackmun opinion very clearly follows the applicable law both as to full faith and credit and *res judicata*. It is not in conflict with any opinion of the Supreme Court or of any appellate court. It is extremely unlikely that such a factual situation will again be presented.

We believe the cases amply demonstrate that the full faith and credit clause has not been violated, that the doctrine of *res judicata* does not apply, and that policy requires that the Federal Court in Missouri be allowed to inquire into the jurisdiction of the Court of Nebraska, and that the opinion of the Eighth Circuit Court of Appeals is not in conflict with any of the decisions of the Supreme

Court of the United States, but rather enunciates the settled, well considered and clearly defined legal principles which must govern situations of this character.

Respondent respectfully prays that certiorari be denied.

Respectfully submitted,

R. A. BROWN,
Tootle-Enright Bank Building,
St. Joseph 2, Missouri,
*Attorney for Respondent.*

**PROOF OF SERVICE.**

I, R. A. Brown, attorney for the respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on November 28, 1962, I served copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to United States Circuit Court of Appeals for the Eighth Circuit, upon the Petitioners, by depositing the same in a United States mailbox with first class postage prepaid, addressed to:

Mr. Harold W. Kaufmann,
730 Farm Credit Building,
Omaha 2, Nebraska,

Mr. Alfred A. Fiedler,
300 Keeline Building,
Omaha 2, Nebraska,

Mr. August Ross,
1405 City National Bank Building,
Omaha 2, Nebraska,

such being the post office addresses of said counsel of record for petitioners.

---

R. A. BROWN,
Tootle-Enright Bank Building,
St. Joseph 2, Missouri,
*Counsel for Respondent.*

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# Supreme Court of the United States

October Term, 1982

No. 82-37
CIVIL

GENE DURFEE and LAURA DURFEE,
*Petitioners,*

vs.

JULIA E. DUKE,
*Respondent.*

## PETITIONERS' REPLY TO RESPONDENT'S BRIEF OPPOSING CERTIORARI

HAROLD W. KAUFFMAN,
730 Farm Credit Building,
Omaha 2, Nebraska,

ALFRED A. FIEDLER,
300 Keeline Building,
Omaha 2, Nebraska,

AUGUST ROSS,
1405 City Natl. Bank Building,
Omaha 2, Nebraska,
*Attorneys for Petitioners.*

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## PETITIONERS' REPLY TO RESPONDENT'S BRIEF OPPOSING CERTIORARI

### ARGUMENT IN REPLY TO RESPONDENT'S BRIEF

Petitioners deem a short reply to respondent's brief opposing certiorari to be called for, primarily for the purpose of directing attention to respondent's erroneous construction of certain cases relied upon by the petitioners.

Respondent challenges petitioners' position that the Court of Appeals erred in holding that the full faith and credit clause does not preclude relitigation in a second forum of the question of the first court's jurisdiction of the subject matter even though subject matter jurisdiction

has been actually litigated in the first forum. However, the respondent's brief (with one exception) carefully avoids the true issue in discussing each of the cases relied upon by the petitioners in connection with both full faith and credit and res judicata, simply by "distinguishing" the cases on the ground that they involved a particular subject matter not involved herein. For example, *Davis v. Davis*, 1938, 305 U. S. 32, 83 L. ed. 26, 59 S. Ct. 3, is purportedly distinguished because it involved a divorce matter. Respondent would distinguish *Stoll v. Gottlieb*, 1938, 305 U. S. 165, 83 L. ed. 104, 59 S. Ct. 134, on the ground that it was a bankruptcy case. Again *Forsyth v. Hammond*, 1897, 166 U. S. 506, 41 L. ed. 1095, 17 S. Ct. 665, is said to be inapplicable because it "did not deal with multi-state questions". The fact remains, however, that all of these cases support the rule precluding the relitigation of the question of subject matter jurisdiction which has actually been litigated in the first court and apply the full faith and credit protection with all its force to such instances.

The one case which respondent attempts to meet head-on and which (at page 3 of the brief opposing certiorari) respondent contends does not support petitioners' contention is *Adam v. Saenger*, 1938, 303 U. S. 59, 82 L. ed. 649, 58 S. Ct. 454. However, the holding of that case clearly supports the view that when a matter of fact or law on which jurisdiction depends was actually litigated in the original suit it may not be relitigated in a subsequent action.

Our position is that *Adam v. Saenger*, supra, and the other cases cited in the petition for writ of certiorari

herein hold that while a second court may in a broad sense "inquire" concerning the first court's subject matter jurisdiction (as too it may "inquire" concerning jurisdiction of the person)* on making such inquiry if it appears that subject matter jurisdiction has actually been litigated by the same parties and a determination has been made on that precise matter in the first case, that determination is res judicata and is entitled to full faith and credit in the courts of other states and in those of the United States. Petitioners again respectfully urge that the landmark case of *Forsyth v. Hammond*, supra, and *Stoll v. Gottlieb*, supra, *Adam v. Saenger*, supra, and many others support the rule of full faith and credit as well as res judicata and that the holdings of those cases preclude another inquiry into the jurisdiction of the subject matter on the part of the Nebraska Supreme Court in *Durfee v. Keiffer*, 1959, 168 Neb. 272, 95 N. W. 2d 618.

---

In view of the statement on page 10 of respondent's brief opposing certiorari to the effect that there will be no confusion if the opinion of the Court of Appeals for the Eighth Circuit is allowed to stand and respondent's contention that the opinion of the Court of Appeals would conclusively determine the issues, we shall discuss this matter in a little more detail than we did in the

---

*For that matter a second court may always "inquire" into what was actually decided or could have been decided even on the merits. In the law of res judicata and full faith and credit the difference between jurisdictional matters (whether jurisdiction of the person or the subject matter is involved) and questions on the merits is that a decision on jurisdictional matters to be conclusive and entitled to full faith and credit must have actually been litigated.

petition for certiorari where we pointed out at pages 15 and 16 that if the Nebraska judgment based upon fully litigated factual determinations is not entitled to full faith and credit neither would a subsequent conflicting Missouri judgment be so entitled.

The Court of Appeals held that subject matter jurisdiction may be inquired into in a case such as this even though the question has been fully litigated. The court further held that the Nebraska Supreme Court judgment is not entitled to full faith and credit. In this circumstance, (1) either a subsequent judgment in the United States Court in Missouri holding that the Nebraska court did not have jurisdiction of the subject matter and that Missouri did have such jurisdiction would likewise be subject to a later attack on the ground of lack of subject matter jurisdiction or (2) the Court of Appeals is in error in holding that subject matter jurisdiction previously litigated in Nebraska may now be inquired into. So the respondent in arguing that the decision of the Court of Appeals herein would determine the issue and that no confusion would result necessarily admits that the Court of Appeals' decision is incorrect.

Neither Section 10(e) of the American Law Institute's Restatement of Judgments nor the cases of *Treinies v. Sunshine Mining Co.*, 1939, 308 U.S. 66, 84 L. ed. 85, 60 S. Ct. 44, and *United States v.* 171.74 *acres of land, etc.*, 1962, D. C. Neb., 206 F. Supp. 322, support a view that subject matter jurisdiction after having been litigated may be relitigated in another court one more time but not a third or fourth time. Rather they support the rule that subject matter jurisdiction having been fully litigat-

ed between the parties, may not be relitigated at all. The ultimate conclusion in Treinies that the Idaho court's determination on subject matter jurisdiction was res judicata was necessarily premised on the fact that the issue once determined could not be relitigated. The holding of the Court of Appeals in the present case is that it may be relitigated, and that decision is in conflict with *Treinies*.

*Treinies v. Sunshine Mining Co.*, supra, was an interpleader action by Sunshine, a Washington corporation, against Treinies and other Washington citizens, claimants to Sunshine stock and accrued dividends and adverse claimants who were Idaho citizens. The interpleader action was brought because of the existence of inconsistent judgments concerning ownership of the Sunshine stock. The Superior Court of Spokane County, Washington, in administering an estate, adjudged that the stock was the property of the assignor of petitioner Evelyn H. Treinies and the District Court of Shoshone County, Idaho adjudged that the same property belonged to respondent Katherine Mason.

It appeared that in 1935 a Washington Superior Court in probate proceedings awarded the property to petitioner's assignor, after the Supreme Court of Washington had refused to grant a writ of prohibition against the exercise of jurisdiction by the superior court. Other proceedings were instituted by respondents in Idaho and in 1936, following an appeal by petitioner to the Supreme Court of Idaho, the District Court in Idaho held that the stock and dividends belonged to respondent Mason.

Later another Washington suit was brought challenging the validity of the Idaho judgment and seeking to quiet title to the stock. At this point the interpleader action was filed by Sunshine and further proceedings in the Washington suit to quiet title were enjoined.

It was held by this court that the Idaho judgment was res judicata even though the Idaho court may have *erroneously* failed to give full faith and credit to the Washington judgment. This court pointed out that if the Idaho court erred the right to review that error was by appeal in the Idaho proceedings and that no review was sought from the final decree of the Idaho District Court on the new findings of fact and conclusions of law on remittitur from the Supreme Court of Idaho.

The doctrine of full faith and credit and the doctrine of res judicata are expressly recognized in the Treinies case in this language, l. c. 308 U. S. 78, 84 L. ed. 93:

> "The Court of Appeals correctly determined that the issue of jurisdiction vel non of the Washington court could not be relitigated in this interpleader. As the Idaho District Court was a court of general jurisdiction, its conclusions are unassailable collaterally except for fraud or lack of jurisdiction. The holding by the Idaho court of no jurisdiction in Washington necessarily determined the question raised here as to the Idaho jurisdiction against Miss Treinies' contention. She is bound by that judgment.
>
> "The power of the Idaho court to examine into the jurisdiction of the Washington court is beyond question. Even where the decision against the validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court.

> "One trial of an issue is enough. 'The principles of res judicata apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties."

In the instant case petitioners are attacking the decision of the Court of Appeals directly not collaterally. We point these matters out to this extent at the present time because of the respondent's contention that while the Nebraska Supreme Court judgment is subject to attack in these Missouri proceedings, any judgment rendered in the Missouri case would not be subject to such an attack. The entire basis for that argument necessarily recognizes the validity of petitioners' argument that full faith and credit should be given to the Nebraska judgment and that likewise the doctrine of res judicata is applicable.

## CONCLUSION

Petitioners assert that federal constitutional and statutory provisions require the Missouri courts including United States Courts sitting in Missouri to give full faith and credit to the judgment of the Nebraska Supreme court. To this respondent replies that the Missouri court cannot be required to give full faith and credit to a judgment of a court whose subject matter jurisdictional foundation is challenged. At this point, however, it must be emphasized that the very matter litigated in the Nebraska case between the petitioners and respondent, that is, the location of the disputed land, is the exact issue upon which the Nebraska court jurisdiction depended and that the Nebraska Supreme Court specifically found that it did have jurisdiction of the subject matter.

The prior cases of this court hold that subject matter jurisdiction once fully litigated between the parties may not again be litigated in subsequent proceedings. The Supreme Court of Nebraska decided that this land is located in the State of Nebraska and there is a factual foundation for that decision. Even if there were not and even if the decision were erroneous, the judgment is entitled to full faith and credit as between the petitioners and the respondent.

Respectfully submitted,

HAROLD W. KAUFFMAN,
730 Farm Credit Building,
Omaha 2, Nebraska,

ALFRED A. FIEDLER,
300 Keeline Building,
Omaha 2, Nebraska,

AUGUST ROSS,
1405 City Natl. Bank Building,
Omaha 2, Nebraska,

*Attorneys for Petitioners.*

## PROOF OF SERVICE

I, Harold W. Kauffman, one of the attorneys for petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on December 6, 1962, I served copies of the foregoing Reply to Respondent's Brief upon respondent by depositing the same in a United States mailbox with first class postage

prepaid, addressed to Robert A. Brown, Tootle-Enright Bank Building, St. Joseph 2, Missouri, such being the post office address of said counsel of record for respondent.

Harold W. Kauffman

HAROLD W. KAUFFMAN,
730 Farm Credit Building,
Omaha 2, Nebraska,
*Counsel for Petitioners.*

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HAROLD W. KAUFFMAN,
730 Farm Credit Building
Omaha 2, Nebraska
ALFRED A. FIEDLER,
300 Keeline Building
Omaha 2, Nebraska
AUGUST ROSS,
1405 City National Bank Building
Omaha 2, Nebraska
*Attorneys for Petitioners.*

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Omaha 2, Nebraska

ALFRED A. FIEDLER,
300 Keeline Building
Omaha 2, Nebraska

AUGUST ROSS,
1405 City National Bank Building
Omaha 2, Nebraska
*Attorneys for Petitioners.*

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## BRIEF OF PETITIONERS

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 308 F. 2d 209, and copy thereof appears in the printed record (R. 52). The opinion of the United States District Court in this case is not reported but a copy thereof entitled "Memorandum Opinion, Findings of Fact, and Conclusions of Law" is likewise included in the printed record (R. 30-43). Also necessary to a full understanding of this case is the opin-

ion of the Supreme Court of Nebraska in *Durfee v. Keiffer*, 1959, 168 Neb. 272, 95 N. W. 2d 618 (R. 17).

## GROUNDS OF JURISDICTION

The judgment before this Court for review is that of the United States Court of Appeals for the Eighth Circuit entered September 18, 1962 (R. 73). This judgment reversed the decree of the United States District Court for the Western District of Missouri, St. Joseph Division (R. 44).

A petition for rehearing and a request for hearing en banc were duly filed and were overruled by the Court of Appeals on October 11, 1962 (R. 74). The petition for certiorari was filed November 14, 1962 and was granted January 7, 1963 (R. 76).

The statutory provision conferring on this Court jurisdiction to review the judgment in question by certiorari is 28 U. S. C. § 1254 (1).

## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case involves the following constitutional and statutory provisions:

(1) U. S. Constitution, Article IV, Section 1 (U. S. C. A. Constitution, Article IV, Section 1):

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such

Acts, Records and Proceedings shall be proved, and the Effect thereof."

(2) Acts June 25, 1948, c. 646, 62 Stat. 947, 28 U. S. C. A., Section 1738:

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affxiing the seal of such State, Territory or Possession thereto.

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

## QUESTIONS PRESENTED FOR REVIEW

A quiet title action was brought in the District Court of Richardson County, Nebraska and the question of that Court's jurisdiction of the subject matter was fully litigated in the trial court. The question was dependent solely upon resolution of a fact issue based upon conflicting evidence concerning whether the Missouri River changed its course by avulsion or by accretion at the point in question, and hence whether the river-bottom land involved was in Nebraska or Missouri. On an appeal taken by the losing claimant subject-matter

jurisdiction was again litigated on trial de novo in the Supreme Court of Nebraska. No review of the Nebraska Supreme Court's judgment was sought in this Court.

The following questions are presented for this Court's review:

1. **Under the foregoing circumstances, is the Nebraska Supreme Court's judgment res judicata in the United States District Court for the District of Missouri in a subsequent title action involving the same land and brought in Missouri by the losing claimant in the Nebraska action against the prevailing claimants therein?**

   [The Court of Appeals in reversing the decree of the United States District Court held that the doctrine of res judicata did not preclude an independent determination by the second forum (United States District Court sitting in Missouri) of the question of jurisdiction of the first (Nebraska Supreme Court) over the subject matter, even though the question had been actually litigated in the trial court in Nebraska and again in the Supreme Court of Nebraska in the first case and the jurisdiction of the Supreme Court of Nebraska had been invoked by the losing claimant who brought the subsequent Missouri action.]

2. **Under the foregoing circumstances, is the Nebraska Supreme Court's judgment entitled to full faith and credit in the United States District Court for the District of Missouri in a subsequent title action involving the same land and brought in Missouri by the losing claimant in the Nebraska action against the prevailing claimants therein?**

   [The Court of Appeals, in reversing the decree of the United States District Court, held categorically that a determination of a court that it has jurisdiction of the person of defendant or of

the subject matter of a suit is not entitled to full faith and credit in a subsequent action brought in a court of another state even though jurisdictional questions involved were actually litigated in the first forum. Hence, the Court of Appeals held that the judgment of the Nebraska Supreme Court was not entitled to full faith and credit in this litigation.]

## STATEMENT OF THE CASE

In November, 1956, Gene and Laura Durfee (hereinafter described as petitioners) filed in the District Court of Richardson County, Nebraska, an action against Julia E. Duke (hereinafter described as respondent) and her tenants to quiet title to certain land located in the Missouri River bottoms, which land was once an island in the river and is now located a short distance east and south of Rulo, Nebraska, and west and south of Fortesque, Missouri (R. 9, 52).

Patents covering the land were issued by the General Land Office of the United States in 1860 and were later filed with the Register of Deeds of Richardson County, Nebraska. The petitioners claimed the land under a Richardson County, Nebraska Sheriff's tax foreclosure sale and the respondent claimed the land through a Holt County, Missouri swamp land patent (R. 53).

The middle of the main channel in the Missouri River forms the boundary between Missouri and Nebraska (R. 53) and the determination of the controversy, both on the question of jurisdiction of subject matter (whether the land was in Nebraska or Missouri) and the question of the merits (ownership of the land) depended solely upon

an issue of fact, that is, whether the river changed its course by accretion or avulsion. The parties were not and are not in disagreement as to the law concerning the effect of accretion and avulsion on mid-channel state boundaries (see footnote 6, R. 68). At this point it suffices to say that if in fact the channel change involved resulted from avulsion the land remained Nebraska land and title was in the petitioners; and if from accretion, it became Missouri land and title was in respondent.

The District Court of Richardson County found the issues in favor of petitioners and quieted title in them (R. 15, 16). *Respondent* then appealed to the Supreme Court of Nebraska where, on trial de novo on the record made in the District Court, the Supreme Court of Nebraska affirmed the judgment (R. 17-29). See *Durfee v. Keiffer*, 168 Neb. 272, 95 N. W. 2d 618.

The Nebraska Supreme Court specifically found that the doctrine of avulsion applied, that the land was Nebraska land, that the court had jurisdiction of the subject matter of the action and that title to the land was in the petitioners (R. 23).

The respondent did not seek review by this court of the judgment of the Nebraska Supreme Court. Rather, the respondent, a Missouri resident, on May 23, 1959—less than two months after the decision of the Nebraska Supreme Court—filed the instant title action in the Circuit Court of Holt County, Missouri praying for a decree that fee simple title to the land was in her and that the petitioners be forever enjoined and restrained from asserting or claiming any right, title or interest in or to any of the property (R. 3, 4).

The case was removed to the United States District Court for the Western District of Missouri, St. Joseph Division, by petitioners, who are residents of Nebraska (R. 1). The Court found that it had jurisdiction by virtue of the diversity of citizenship of the parties and the amount in controversy which exceeded in value the sum of $10,000.00 exclusive of interest and costs (R. 30).

The Court, the Honorable R. M. Duncan, sitting, held that the judgment of the Nebraska Supreme Court was res judicata and that the issues involved therein could not be relitigated by the same parties in Missouri. The Court, however, said that in his opinion the decision of the Nebraska Supreme Court was erroneous and that if the question had been presented to him initially he would have found for respondent (R. 40-42).

The respondent appealed from the judgment of the United States District Court to the United States Court of Appeals for the Eighth Circuit (R. 50) and that Court, sitting in division, held that the full faith and credit clause as implemented by congressional action did not apply to the case because jurisdiction of subject matter was involved. The court further held that the doctrine of res judicata did not apply (R. 52-72).

As to res judicata, the Court of Appeals apparently thought, inasmuch as jurisdiction of the subject matter was involved, the subject matter was land, and the question was whether this border-line river land was located in one or another of two different states, that Missouri courts were not bound by the decision of the Nebraska Supreme Court. The Court of Appeals pointed out the five factors stated in the American Law Institute's Re-

statement of Judgments and Restatement of Conflicts to be important to a decision on whether there was an overriding policy which would defeat the application of the doctrine of res judicata and held that the Restatement correctly stated the law as this court has developed it. The Court then found four of the five factors in favor of the petitioners but held that considerations of policy nevertheless required a decision that the United States District Court in Missouri could make an independent determination concerning the question of jurisdiction of the subject matter.

## SUMMARY OF ARGUMENT

### I.

Where a jurisdictional question is actually litigated and determined it may not later be redetermined in a subsequent action between the same parties, and the first judgment is res judicata on such jurisdictional issues. This rule is applicable to subject-matter jurisdictional issues as well as to issues involving jurisdiction of the person.

**Authorities on Jurisdiction of the Person**

*Chicago Life Insurance Co. v. Cherry*, 1917, 244 U. S. 25, 61 L. ed. 966, 37 S. Ct. 492.

*Baldwin v. Iowa State Traveling Men's Association*, 1931, 283 U. S. 522, 75 L. ed. 1244, 51 S. Ct. 517.

**Authorities on Jurisdiction of the Subject Matter**

*Forsyth v. Hammond*, 1897, 166 U. S. 506, 41 L. ed. 1095, 17 S. Ct. 665.

*Stoll v. Gottlieb*, 1938, 305 U. S. 165, 83 L. ed. 104, 59 S. Ct. 134.

*Treinies v. Sunshine Mining Co.*, 1939, 308 U. S. 66, 84 L. ed. 85, 60 S. Ct. 44.

*Jackson v. Irving Trust Co.*, 1941, 311 U. S. 494, 85 L. ed. 297, 61 S. Ct. 326.

*Chicot Co. Drainage District v. Baxter State Bank*, 1940, 308 U. S. 371, 84 L. ed. 329, 60 S. Ct. 317.

II.

Where a subject matter jurisdictional issue has been fully litigated in a court in which the losing litigant sought relief, the judgment is res judicata and is subject only to direct attack. The losing litigant having chosen the forum to decide the matter may not collaterally attack its judgment in a subsequent action between the same parties.

*Forsyth v. Hammond*, 1897, 166 U. S. 506, 41 L. ed. 1095, 17 S. Ct. 665.

See also: *Chicago Life Insurance Co. v. Cherry*, 1917, 244 U. S. 25, 61 L. ed. 966, 37 S. Ct. 492.

III.

The cases relied upon by the Court of Appeals in its decision presently reviewed, in which this Court declared an exception and held that res judicata did not apply to jurisdiction of the subject matter in the particular case, are distinguishable from the instant case. Generally speaking they involve questions of governmental policy. They do not involve questions of fact between private litigants actually litigated by them and determined in the first action

See:

*Valley v. Northern Fire & Marine Insurance Co.*, 1920, 254 U. S. 348, 65 L. ed. 297, 41 S. Ct. 116.

*Grubb v. Public Utilities Commission*, 1930, 281 U. S. 470, 74 L. ed. 972, 50 S. Ct. 374.

*United States v. United States Fidelity & Guaranty Co.*, 1940, 309 U. S. 506, 84 L. ed. 894, 60 S. Ct. 653.

IV.

Tested by the pronouncements found in the American Law Institute's Restatement of the Law of Judgments, Section 10, and Conflicts of Law (1948 Supp.), Section 451 (2), the judgment of the Nebraska court in *Durfee v. Keiffer*, 168 Neb. 272, 95 N. W. 2d 618, is res judicata as to matters actually litigated in the Nebraska court including the issue of subject matter jurisdiction, and that judgment is not subject to attack in this action subsequently brought in Missouri.

Restatement, Judgments, § 10.

Restatement, Conflicts of Law (1948 Supp.), § 451 (2).

V.

Neither of the sovereign states of Nebraska and Missouri is bound by the decision in this case and there is no overriding policy involving a state's sovereignty that authorizes refusal to apply the doctrine of res judicata herein.

*United States v. Lee*, 1882, 106 U. S. 196, 27 L. ed. 171, 1 S. Ct. 240.

*Land v. Dollar*, 1947, 330 U. S. 731, 91 L. ed. 1209, 67 S. Ct. 1009.

*Williams v. North Carolina*, 1945, 325 U. S. 226, 89 L. ed. 1577, 65 S. Ct. 1092.

U. S. Constitution, Article I, Section 10.

U. S. Constitution, Article III, Section 2.

VI.

The doctrine of full faith and credit, like that of res judicata, applies to jurisdictional questions actually litigated in the prior action and applies as well to questions of jurisdiction of the subject matter as to questions of jurisdiction of the person.

*Chicago Life Insurance Co. v. Cherry*, 1917, 244 U. S. 25, 61 L. ed. 966, 37 S. Ct. 492.

*Davis v. Davis*, 1938, 305 U. S. 32, 83 L. ed. 26, 59 S. Ct. 3.

*Williams v. North Carolina*, 1945, 325 U. S. 226, 89 L. ed. 1577, 65 S. Ct. 1092.

*Sherrer v. Sherrer*, 1948, 334 U. S. 343, 92 L. ed. 1429, 68 S. Ct. 1087.

VII.

The cases relied upon by the Court of Appeals in holding that the full faith and credit clause does not preclude a second forum's redetermination of questions of the first forum's personal or subject matter jurisdiction do not involve situations where the jurisdictional matters had been actually litigated by the parties in the first action, and do not preclude the application of the full faith and credit doctrine to such jurisdictional issues.

See:

*Thompson v. Whitman*, 1874, 85 U. S. (18 Wall.) 457, 21 L. ed. 897.

*Grover & Baker Sewing Machine Co. v. Radcliffe*, 1890, 137 U. S. 287, 34 L. ed. 670, 11 S. Ct. 92.

*Adam v. Saenger*, 1938, 303 U. S. 59, 82 L. ed. 649, 58 S. Ct. 454.

*Milliken v. Meyer*, 1940, 311 U. S. 457, 85 L. ed. 278, 61 S. Ct. 339.

*Western Union Telegraph Co. v. Pennsylvania*, 1961, 368 U. S. 71, 7 L. ed. 2d 139, 82 S. Ct. 199.

VIII.

A quiet title action was brought in the District Court of Richardson County, Nebraska and the question of that court's jurisdiction of the subject matter was fully litigated in the trial court. The question was dependent solely upon resolution of a fact issue based upon conflicting evidence concerning whether the Missouri River changed its course by avulsion or by accretion at the point in question, and hence whether the river-bottom land involved was located in Nebraska or Missouri. On appeal taken by the losing claimant subject-matter jurisdiction was again litigated on trial de novo in the Supreme Court of Nebraska. No review of the Nebraska Supreme Court's judgment was sought in this Court. Under the above circumstances, the Nebraska Supreme Court's judgment is res judicata in this subsequent title action involving the same land and brought in Missouri by the losing claimant in the Nebraska action against the prevailing claimants therein, and the Nebraska judgment is entitled to full faith and credit in the Missouri action.

[See authorities cited under other paragraphs in this summary.]

## ARGUMENT

### Prefatory Statement

As disclosed by the record in this case, including the various opinions of the courts below, the crux of the controversy between these same parties in the Nebraska litigation, as respects subject-matter jurisdiction, was whether the main channel of the Missouri River at the point in question shifted by reason of accretion or avulsion. If it shifted by accretion the land in question became Missouri land; if it shifted by reason of avulsion it remained in Nebraska where admittedly it was located originally.

The District Court of Richardson County, Nebraska and the Supreme Court of Nebraska on trial de novo specifically found, on the facts presented by each side in the district court, that the land remained in Nebraska and that Nebraska had jurisdiction of the subject matter of the action. No effort was made by respondent to obtain review by this Court of the Nebraska Supreme Court's judgment.

The sole question presented on certiorari is whether the determination of the Nebraska Supreme Court on the question of subject-matter jurisdiction is conclusive under the principles of res judicata and full faith and credit.

While the Court of Appeals treated full faith and credit and res judicata as entirely separate issues and disposed first of the question of full faith and credit (though in a somewhat summary manner), we recognize that the two questions are interwoven and we feel that res judicata should be considered first. If the Nebraska

judgment is res judicata, we submit that it necessarily follows that such judgment is entitled to full faith and credit in the Missouri courts, both state and federal. Hence we shall herein discuss first the issue of res judicata, then proceed to the constitutional and statutory requirements of full faith.

## Res Judicata

On the issue of res judicata the Court of Appeals recognized the rule that ordinarily if a jurisdictional question is determined between the parties in the first suit it may not later be redetermined and that the first judgment is res judicata on such jurisdictional issues. As to jurisdiction of the person the Court of Appeals suggests no exceptions to this rule but as to subject-matter jurisdiction the court noted what it felt to be exceptions based upon special considerations of policy and the court ultimately concluded that the instant case presented a situation calling for the recognition of an exception. In this determination we respectfully submit that the Court of Appeals failed to view the case in the correct perspective and fell into error requiring reversal of its judgment.

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We shall not extensively review the cases involving the applicability of the res judicata doctrine to issues of jurisdiction of the person. Respondent herein fully submitted herself to the jurisdiction of the Nebraska courts and recognized that jurisdiction, and there appears to be no dispute that such issues once actually litigated fall within the protection of res judicata. This rule is sustained by many cases including *Chicago Life Insurance*

*Co. v. Cherry*, 1917, 244 U. S. 25, 61 L. ed. 966, 37 S. Ct. 492, and *Baldwin v. Iowa State Traveling Men's Association*, 1931, 283 U. S. 522, 75 L. ed. 1244, 51 S. Ct. 517. We submit that the rule applied in such cases is no less pertinent in principle to subject-matter jurisdictional issues than to those of jurisdiction of the person, and that the reasons for the rule are the same in either instance. Recognition of this is reflected in the numerous references by this Court to personal jurisdiction cases (especially to *Baldwin v. Iowa State Traveling Men's Association*, supra, and *Chicago Life Insurance Co. v. Cherry*, supra) in decisions involving the applicability of the full faith and credit and res judicata doctrines to subject matter issues.

We turn to an examination of the cases involving subject-matter jurisdiction. A landmark case and one peculiarly apposite, in point of fact, is *Forsyth v. Hammond*, 1897, 166 U. S. 506, 41 L. ed. 1095, 17 S. Ct. 665. The Forsyth case is referred to in the opinion of the Court of Appeals but the court declined to apply its holding to this case, although it recognized conflict between the decision herein and that in Forsyth by attempting to explain "any apparent out-of-jointedness" of the Forsyth case (R. 71, 308 F. 2d at page 220).

In Forsyth, respondent Caroline M. Forsyth sought by injunction in the federal court to forbid the City of Hammond, Indiana from collecting taxes on certain land annexed to the city by an earlier state court decree. The city contended that the earlier decree was res judicata and decisive in the injunction case and the respondent contended that it was void because the enlargement of a city was a matter of legislative rather than judicial cog-

nizance. This Court upheld the contention of the city and pointed out that the respondent had taken an appeal to the Supreme Court of Indiana from the earlier decree of the trial court against her in the annexation proceedings and had on that appeal attacked the validity of the decree on the ground of lack of jurisdiction of the subject matter. Thus, at page 517 of 166 U. S., pages 1099 and 1100 of 41 L. ed., this Court said:

> "* * * If action by the state tribunals stopped with the decree of the trial court, it might be said that the plaintiff did not voluntarily seek that forum. She was brought in by appropriate process, and compelled to there litigate the question. But after an adverse decree she insisted that it was not only erroneous but void, and voluntarily commenced an action in the supreme court of the state to have that claim established. She invoked the jurisdiction of that court. She summoned the city of Hammond into that forum and there c h a l l e n g e d the decree of the circuit court, challenged it for error and also for lack of jurisdiction. The questions both of error and of jurisdiction were certainly judicial in their nature and questions within the undoubted cognizance of the supreme court. She voluntarily sought its judgment. Can she, after its decision, be heard in any other tribunal to collaterally deny the validity thereof? Does not the principle of res judicata apply in all its force? Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? The question is not whether the judgment of the supreme court would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other forum."

In the Forsyth case as here, real property as subject-

matter jurisdiction was involved. There, as here, the one subsequently attacking the prior decree voluntarily sought the judgment of the appellate tribunal in the first case. The instant case is even stronger for application of res judicata for the reason that, unlike the situation in Forsyth, this second action is identical to the prior one, that is, both are title actions, the second having been brought to relitigate in another forum the same matter litigated in the first with the former defendant as the plaintiff in the subsequent action.

In *Stoll v. Gottlieb*, 1938, 305 U. S. 165, 83 L. ed. 104, 59 S. Ct. 134, this Court reviewed and reversed a judgment of the Supreme Court of Illinois which denied effect to a plea of res judicata arising from orders of an Illinois United States District Court entered in a bankruptcy proceeding. The original orders had been entered in a hearing at which the respondent Gottlieb, though notified, failed to appear. However, after the institution of the state court action respondent filed a petition in the bankruptcy court to vacate and modify the prior orders in bankruptcy on the ground that the United States District Court did not have power or jurisdiction to cancel a certain guaranty which was involved in the proceedings. An order was entered denying this petition and no appeal was taken. This Court held that regardless of whether the power of the bankruptcy court to deal with the particular subject was strictly jurisdictional or was quasi-jurisdictional the matter having been litigated in the bankruptcy court, that court's order was res judicata of its jurisdiction to cancel the guaranty. In its opinion this Court said at pages 172, 173 of 305 U. S., page 109 of 83 L. ed.:

"When an erroneous judgment, whether from the court of first instance or from the court of final resort, is pleaded in another court or another jurisdiction the question is whether the former judgment is res judicata. After a federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of res judicata is made has not the power to inquire again into that jurisdictional fact. We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. In this case the order upon the petition to vacate the confirmation settled the contest over jurisdiction.

"Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retires the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

"That a former judgment in a state court is conclusive between the parties and their privies in a federal court when entered upon an actually contested issue as to the jurisdiction of the court over the subject matter of the litigation, has been determined by this Court in Forsyth v. Hammond. [166 U.S. 506, 41 L. ed. 1095, 17 S. Ct. 665.] * * * "

In *Treinies v. Sunshine Mining Co.*, 1939, 308 U.S. 66, 84 L. ed. 85, 60 S. Ct. 44, this Court applied res judicata to a question of jurisdiction of the subject-matter

which had previously been litigated and in so doing made no distinction between a case involving subject-matter jurisdiction and a case involving jurisdiction of the person. In fact, the Court in Treinies cited in support of its decision *Baldwin v. Iowa State Traveling Men's Association*, supra.

*Treinies v. Sunshine Mining Co.*, supra, was an interpleader action by Sunshine, a Washington corporation, brought in the federal court in Idaho against petitioner Evelyn H. Treinies and other Washington citizens, claimants to Sunshine stock and accrued dividends, and adverse claimants including respondent Katherine Mason who were Idaho citizens. The interpleader action was brought because of the existence of inconsistent judgments concerning ownership of Sunshine stock. The Superior Court of Spokane County, Washington, in administering an estate had adjudged that the stock was the property of the assignor of petitioner Evelyn H. Treinies and the District Court of Shoshone County, Idaho, had adjudged that the same property belonged to respondent Katherine Mason.

It appeared that in 1935, a Washington superior court in probate proceedings awarded the property to the petitioner's assignor, after the Supreme Court of Washington had refused to grant a writ of prohibition against the exercise of jurisdiction by the superior court. Other proceedings involving ownership of the same property had previously been instituted by respondents in Idaho (in August, 1934) and in 1936 following an appeal by petitioner to the Supreme Court of Idaho, the district court of Idaho on new findings of fact and conclusions of law held that the stock and dividends belonged to respondent

Mason. No appeal was taken from the final decree of the Idaho district court on its new findings of fact and conclusions of law following remitter from the Supreme Court of Idaho.

In the opinion in the Treinies case this Court at page 78 of 308 U. S., page 93 of 84 L. ed., had this to say:

> "The Court of Appeals correctly determined that the issue of jurisdiction vel non of the Washington court could not be relitigated in this interpleader. As the Idaho District Court was a court of general jurisdiction, its conclusions are unassailable collaterally except for fraud or lack of jurisdiction. The holding by the Idaho court of no jurisdiction in Washington necessarily determined the question raised here as to the Idaho jurisdiction against Miss Treinies' contention. She is bound by that judgment.
>
> "The power of the Idaho court to examine into the jurisdiction of the Washington court is beyond question. Even where the decision against the validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court.
>
> "One trial of an issue is enough. 'The principles of res judicata apply to questions of jurisdiction as well as to other issues', as well to jurisdiction of the subject matter as of the parties."

*Jackson v. Irving Trust Co.*, 1941, 311 U. S. 494, 85 L. ed. 297, 61 S. Ct. 326, applies the res judicata doctrine in all its force to a subject matter jurisdictional question as against a contention that such question was not actually litigated in the first instance. It appears that in a suit brought in 1927 in the District Court of the United States for the Southern District of New York under the Trading With The Enemy Act, a decree was entered in December, 1929, directing payment to the plaintiff of a stated amount

out of the property of a German corporation which had been seized by the Alien Property Custodian. There was no appeal and the amount awarded was paid. In 1938 the United States moved to set aside the decree contending that the court had been without jurisdiction. The district court granted the motion and the Court of Appeals reversed and reinstated the original decree.

At the original trial a fact issue was presented by the pleadings and proof regarding whether the beneficial owner of the debt was an "enemy" within the Trading With The Enemy Act and therefore not entitled to sue under the act, and such issue was decided against the government's contentions. This Court affirmed the judgment of the Court of Appeals, holding that when the dismissal of the suit was asked by counsel for the government on the ground that the beneficial owner was an enemy under the act the issues thus raised were the same as those which pertain to the jurisdictional question of the right to sue under the act, that regardless of how the issues were labeled the court was authorized to determine them, and that whether the particular issue was actually litigated was immaterial in view of the necessary conclusion that there was full opportunity to litigate it and that it was adjudicated by the decree.

In *Chicot Co. Drainage District v. Baxter State Bank*, 1940, 308 U. S. 371, 84 L. ed. 329, 60 S. Ct. 317, this Court extended the protection of res judicata to a decree entered in a proceeding instituted by a drainage district under an act providing for "Municipal Debt Readjustment" and refused to permit a subsequent attack on subject-matter jurisdiction, even though the issue was not actually pre-

sented in the first suit. The attack on the decree was based on lack of jurisdiction of the subject matter because subsequent to its entry the act upon which the proceedings were based was held by this Court in another case to be unconstitutional. It is pointed out in the opinion that while the statute was not attacked as unconstitutional in the original proceedings for readjustment of indebtedness, the parties were before the Court and could have raised the constitutional question and had it determined. This Court at page 377 of 308 U. S., page 334 of 84 L. ed., said:

> "The Court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against an attack, while open to direct review, is res judicata in a collateral action",

citing *Stoll v. Gottlieb*, supra.

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There are three cases decided by this Court which the Court of Appeals seemed to rely upon in holding that the facts herein require recognition of an exception to the general rule and that the district court erred in applying the res judicata doctrine. They are: *Vallely v. Northern Fire & Marine Insurance Co.*, 1920, 254 U. S. 348, 65 L. ed. 297, 41 S. Ct. 116; *Grubb v. Public Utilities Comm.*, 1930, 281 U. S. 470, 74 L. ed. 972, 50 S. Ct. 374; and *United States v. United States Fidelity & Guaranty Co.*, 1940, 309 U. S. 506, 84 L. ed. 894, 60 S. Ct. 653.

In *Vallely v. Northern Fire & Marine Insurance Co.*, supra, the insurance company was adjudicated an involuntary bankrupt on a creditor's petition. While the company was served with process it defaulted and an order of adjudication was rendered from which no appeal was

taken. After appeal time had expired, the company filed a motion to vacate the adjudication on the ground that the court was without jurisdiction because as an insurance corporation it was specifically exempted by the bankruptcy act from adjudication in bankruptcy. The motion was sustained and the creditor's petition was dismissed. The trustee filed a petition in the Court of Appeals to revise the order of the district court in a matter of law and the case was certified to this Court for instructions. This Court permitted the attack for lack of jurisdiction pointing out that the bankruptcy act specifically exempted insurance companies from its provisions, that there was no bankruptcy statute applicable to them and that jurisdiction did not depend upon the resolution of any questions of fact.

In the Vallely case, supra, this Court distinguishes *First National Bank v. Klug*, 1902, 186 U. S. 202, 46 L. ed. 1127, 22 S. Ct. 899, where subject matter jurisdiction depended upon a question of fact as to whether the alleged bankrupt was "engaged chiefly in farming". In that situation this Court had held that the District Court in determining that the alleged bankrupt, Klug, could not be adjudged a bankrupt, had jurisdiction to make the determination and that its jurisdiction over the subject matter was not and could not be questioned. In the course of the opinion in the Vallely case this Court mentions on numerous occasions the fact that a default was involved and Vallely is distinguished in *Stoll v. Gottlieb*, supra, on that basis, 305 U. S. 175, 176, 83 L. ed. 110, 111. Also Vallely involved governmental policy, not simply a fact question between private litigants.

*Grubb v. Public Utilities Comm.*, 1930, 281 U. S. 470, 74 L. ed. 972, 50 S. Ct. 374, was an appeal from a decree of the United States District Court for the Southern District of Ohio dismissing a bill to restrain the enforcement of an order of the Ohio Public Utilities Commission prohibiting the operation of a portion of a bus route for which leave had been sought. It appeared that after the commission denied a rehearing appellant obtained review of the commission's order by the Supreme Court of Ohio in a proceeding to which the commission was a party defendant. The Ohio Supreme Court affirmed the commission's order and after the expiration of the time allowed to apply for review in this Court, defendants in the suit in the United States District Court, by leave of that court, interposed answers setting up the judgment as a bar to further prosecution of the suit. The district court sustained the plea and dismissed the bill.

In the Grubb case this Court held that the appellant could raise the question of jurisdiction of the subject matter even though at the outset he treated that jurisdiction as subsisting and invoked its exercise. However, this Court also held that the state court had jurisdiction and decided the appeal against the appellant.

The Grubb case, supra, did not involve a question of jurisdiction of the subject matter which had been actually litigated between the parties. Rather, it involved an application of the rule that jurisdiction of the subject matter may not be conferred by consent of the parties—the very antithesis of jurisdiction based upon a judgment of a court following an actual litigation of the issue by the parties involved.

*United States v. United States Fidelity & Guaranty Co.*, 1940, 209 U. S. 506, 84 L. ed. 894, 60 S. Ct. 653, is another case which did not involve an actual litigation of the jurisdictional issues in the first court. It too involved a question of governmental policy.

The government, on behalf of certain Indian nations filed a claim against a coal company in a receivership proceeding in the Western District of Missouri for royalties due under certain leases which had been assigned to the company. The company denied that royalties were owing and claimed certain credits against the nations. By court order reorganization of the company under section 77b of the Bankruptcy Act was instituted and the trustee took possession from the receivers. In the reorganization proceedings the claim of the nations was allowed for $2,000.00 and the debtor's cross-claim was allowed for $11,060.90 and the court decreed a balance of $9,060.90 in favor of the debtor to be "collected in the manner provided by law." No review of this judgment of the Missouri District Court was sought.

Subsequently the United States on its behalf and on behalf of the Indian nations filed a suit in the Eastern District of Oklahoma against the guaranty company as surety on the royalty bond for the same royalties involved in the Missouri proceedings. After entry of the judgment of the Missouri court the guaranty company pleaded that judgment as a bar to recovery by the United States. The trustee and another corporation which had taken over certain assets of the coal company intervened and pleaded the Missouri judgment as determinative. The district court concluded that the Missouri judgment barred

the claim against the sureties and entitled the interveners to judgment against the Indian nations in the amount of the balance found by the Missouri court. The judgment was affirmed by the Court of Appeals.

This Court reversed the judgment of the Court of Appeals, holding that there was no stautory authority granting jurisdiction to the Missouri court to adjudicate a cross-claim against the United States and the Indian nations in tutelage, and that the immunity could not be waived by officials.

As previously indicated, *United States v. United States Fidelity & Guaranty Co.*, supra, did not involve litigation of the question of subject matter jurisdiction in the first court. It involved a question of governmental immunity which could not be waived by governmental officials by failure to object to jurisdiction of the Missouri district court over the cross-claim.

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After reviewing the opinions of this Court in the cases we have discussed, supra, the Court of Appeals turned to pronouncements found in the American Law Institute's Restatement of the Law of Judgments, Section 10, and Conflicts of Law (1948 Supp.), Section 451 (2), found that these pronouncements represented the law as this Court has developed it to date, and held that its duty was to apply that law to the instant facts.

Of course it is for this Court itself to say whether the Restatement correctly reflects its views, but for present purposes we may assume that it does. We submit that the conclusion finally reached by the Court of Ap-

peals (that res judicata does not apply here) is no more supported by the Restatement than by Supreme Court decisions.

The texts of Restatement, Judgments, Section 10, and of Restatement, Conflicts of Law (1948 Supp.), Section 451 (2) are identical in language:

> "Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction. Among the factors appropriate to be considered in determining that collateral attack should be permitted are that
>
> (a) the lack of jurisdiction over the subject matter was clear;
>
> (b) the determination as to jurisdiction depended upon a question of law rather than of fact;
>
> (c) the court was one of limited and not of general jurisdiction;
>
> (d) the question of jurisdiction was not actually litigated;
>
> (e) the policy against the court's acting beyond its jurisdiction is strong."

Prior to our independent examination of the instant case in the light of the views announced in the Restatement, we direct the Court's attention to a matter of importance in that examination.

The Court of Appeals found the first four of the five factors mentioned in the Restatement in favor of the pe-

titioners; then, although seeming to come to the brink of a holding that res judicata should apply, the court found a "policy" which it held to take precedence over that doctrine. It appears to the petitioners that this finding is based upon a misconception of what the Restatement actually says and that in effect the court below parted company with the Restatement.

The Restatement says that if the court has jurisdiction of the parties and determines that it has jurisdiction of the subject matter the parties cannot collaterally attack the judgment for lack of subject matter jurisdiction *unless* the policy underlying the res judicata rule is outweighed by a policy against permitting the court to act beyond its jurisdiction. Then the Restatement lists matters which it says are among the factors to be considered in determining whether the collateral attack should be permitted. These are five in number. The first four are directed to the question whether in the particular case *there is a policy* opposed to the policy underlying the doctrine of res judicata. The fifth factor addresses itself to degree—that is the strength of the policy found on examination of the case in the light of the first four factors listed, as opposed to the policy encompassed by the res judicata doctrine.

The Court of Appeals, having found the first four factors in favor of petitioners, seems to have treated the remaining factor, that is "(e) The policy against the court's acting beyond its jurisdiction is strong", separately and as if it constituted an independent ground for collateral attack, rather than a statement of the degree

of policy the existence of which has previously been determined by reference to other factors.

In the factors suggested by the Restatement are found ample guideposts for determination of the instant case. We proceed to a discussion of this controversy tested by such factors.

**Supposed Lack of Jurisdiction Not Clear (Factor (a) )**

The Court of Appeals recognized that "The Nebraska courts' lack of jurisdiction is not particularly clear." We suggest that this is indeed an understatement. Any lack of jurisdiction of the Nebraska courts would necessarily be based upon an independent determination of fact that the Missouri River changed course as a result of accretion instead of avulsion as determined in the prior Nebraska action. In holding that any such jurisdictional defect is "not particularly clear" the court below recognized that the evidence regarding the channel change was conflicting and that if there were a contrary decision in the Missouri federal court its subject-matter jurisdiction would be *no more clear*.

Aside from other consideration, it is well settled that if a judgment on its face appears to be a record of a court of general jurisdiction, jurisdiction over the cause as well as over the parties is to be presumed unless disproved by extrinsic evidence or by the record itself. *Adam v. Saenger*, 1938, 303 U. S. 59, 62, 82 L. ed. 649, 651, 652, 58 S. Ct. 454; *Milliken v. Meyer*, 1940, 311 U. S. 457, 462, 85 L. ed. 278, 282, 61 S. Ct. 339. We respectfully submit that the subject-matter jurisdiction of the Nebraska courts was in no sense disproved.

**Jurisdictional Determination Depended on Fact Issue Actually Litigated in Court of General Jurisdiction (Factors (b), (c), and (d) )**

Factors (b), (c), and (d) suggested by the Restatement were each determined by the Court of Appeals favorably to the position of the petitioners. We discuss these factors together.

In the first place, the District Court of Richardson County, Nebraska is a court of general and not merely limited jurisdiction (Const. Neb. Art. V, Secs. 1, 9) and its judgment was subject to review de novo in the Supreme Court of Nebraska (Const. Neb. Art. I, Sec. 24, Art. V, Secs. 1, 2; R. R. S. Neb. 1943, §§ 25-1911, 25-1925).

Secondly, the determination as to the jurisdictional issue herein depended not upon a question of law but upon a question of fact, to wit, whether the Missouri River channel changed as a result of avulsion or accretion.

On the question of actual litigation of the jurisdictional issue, the record discloses that the issue of subject matter jurisdiction was fully litigated in the Nebraska courts between the petitioners and the respondent. In this connection, we direct attention to two matters which give special significance to this factor in the case at bar.

First, the litigation of the issue of subject matter jurisdiction involved the very crux of the case on the merits as well as on the right of the Nebraska courts to hear and decide the cause. Jurisdiction of the subject matter was specifically put in issue in the Nebraska case by respondent at the very first opportunity to do so

(R. 13) and in addition, the identical issue of fact was also determinative of title to the disputed land. As stated by the Court of Appeals (R. 68) " • • • The jurisdictional inquiry necessarily coincides with the merits • • • ."

Voluminous evidence was received on this purely factual issue and the Nebraska courts were called upon to delve into this evidence, resolve the conflicts in the testimony, and decide whether the Missouri River channel change resulted from avulsion or accretion. This the Nebraska courts did and there is no reason to believe that Missouri courts could come to a more accurate and correct conclusion from this evidence than that reached in Nebraska.

Secondly, the jurisdiction of the Supreme Court of Nebraska *was invoked by respondent herself*, which brings this case directly within the holding in *Forsyth v. Hammond*, supra (166 U. S. 506, 41 L. ed. 1095, 17 S. Ct. 665). In Forsyth, which involved land as subject matter, this Court held that where the losing litigant in the trial court in the first case voluntarily took an appeal, thereby invoking the jurisdiction of the State Supreme Court, she was concluded by its decision and under the doctrine of res judicata she could not later, and in another tribunal collaterally attack the Supreme Court's judgment on the ground of lack of jurisdiction of the subject matter. See quotation from the Forsyth case, supra, page 16.

The reasoning underlying this Court's decision in Forsyth has particular force here, for respondent in appealing to the Supreme Court of Nebraska not only invoked that court's jurisdiction but she thereby sought and obtained a decision de novo on the very question she now

seeks to relitigate in Missouri. Under R. R. S. Neb. 1943, § 25-1925, in all appeals from the district court to the Supreme Court of Nebraska in equity suits, the Supreme Court has the mandatory duty to try the fact issues de novo on the evidence preserved in the Bill of Exceptions (in Nebraska this includes a transcript of the evidence) and to reach an independent conclusion on fact questions regardless of the conclusions reached in the district court or the fact that there may be some evidence to support them. This rule controls in actions to quiet title, *Elrich v. Ostwald*, 154 Neb. 8, 46 N. W. 2d 686; *Evers v. Evers*, 146 Neb. 104, 18 N. W. 2d 673; and was applied by the Nebraska Supreme Court (R. 18). See *Durfee v. Keiffer*, at page 622 of 95 N. W. 2d.

**There Is No Strong Policy Opposing Application of Res Judicata Doctrine (Factor (e) )**

Regardless of the manner in which the question of "'policy" is approached, the circumstances of this case calling for the application of the principles of res judicata and full faith and credit far outweigh any opposing considerations. If approached in the light of the factors specifically set out in the Restatement, what has been said herein is sufficient. This case, tested by the first four factors mentioned therein, discloses no opposing policy, so the fifth factor regarding the strength of such a policy becomes moot.

On the other hand, even assuming, arguendo, that the Nebraska courts may have been in error in their decisions that the channel change was caused by avulsion there would still remain the question of weighing one policy against the other, that is the policy of conclusiveness of

the prior court determinations based upon actual litigation of fact issues as opposed to a policy against a court's supposedly acting beyond its jurisdiction.

The Court of Appeals found that there was a strong policy against precluding a court of an adjoining state from making an independent determination of the situs of borderline land which has previously been determined in the courts of the first state, though the determination is made in private litigation and cannot bind either of the two states themselves.

In this connection it is clear that neither Nebraska nor Missouri will be bound by the decision in this case. See *United States v. Lee*, 1882, 106 U. S. 196, 27 L. ed. 171, 1 S. Ct. 240; *Land v. Dollar*, 1947, 330 U. S. 731, 739, 91 L. ed. 1209, 1216, 67 S. Ct. 1009; *Williams v. North Carolina*, 1945, 325 U. S. 226, 230, 89 L. ed. 1577, 1582, 65 S. Ct. 1092. The two states must settle any boundary dispute they may have by compact approved by Congress (Constitution Article I, Sec. 10) or by litigation initiated in this Court (Constitution Article III, Sec. 2). However, the Court of Appeals concluded that a state's sovereignty, the validity of its land titles, and the power to tax might "indirectly" be affected by private litigation such as this (R. 71). So the court concluded that as a matter of policy where land is concerned the court of a second state should have the opportunity to satisfy itself of the first court's subject-matter jurisdiction, regardless of other considerations. The court said (R. 71):

> "After careful consideration we conclude that, for a land case such as this, a policy of careful recognition of jurisdictional limitations and of permitting inquiry into the basis of subject-matter jurisdic-

tion outweighs any conflicting res judicata principle."

The above conclusion is difficult to understand, especially in view of the court's determination that "the Nebraska courts' lack of jurisdiction is not particularly clear" (R. 68). This observation was obviously based upon the fact that jurisdiction depended upon the resolution of a fact question concerning the cause of the change in the channel of the Missouri River.

This case does not involve an attempt by a state to assume jurisdiction over land clearly outside its boundaries. Neither Nebraska nor Missouri would attempt arbitrarily to usurp the jurisdiction of the other. The core of the controversy here is the location of the land in one state or the other which depends entirely upon the question of fact previously determined in the Nebraska litigation.

This brings us to a further consideration. If the Nebraska Supreme Court's judgment is not conclusive, neither would a subsequent Missouri judgment settle the matter. Such a judgment, holding Missouri to be the situs of the land, would have no more sanctity and no more conclusiveness than the prior Nebraska decision holding Nebraska to be the situs. If the Nebraska judgment is not entitled to full faith and credit, neither would a subsequent conflicting Missouri judgment be so entitled. The two decisions, while settling nothing between the states of Nebraska and Missouri, would merely prolong the private litigation between the petitioners and respondent which even now has been in court for more than six years. On the other hand, a holding that the matter once determined by the Supreme Court of Ne-

braska at the instance of the respondent herself is conclusive as between the parties and that the Nebraska judgment is entitled to full faith and credit would terminate this litigation.

On page 10 of respondent's brief opposing the granting of certiorari it is contended that if the opinion of the Court of Appeals is allowed to stand it will be "the second and binding opinion and it will finally and conclusively determine the issues." We respectfully disagree.

The Court of Appeals held that subject-matter jurisdiction may be redetermined even though the question has been fully litigated. The court further held that the Nebraska Supreme Court judgment is not entitled to full faith and credit. In these circumstances either (1) subsequent judgment of the United States Court in Missouri holding that the Nebraska court did not have jurisdiction would likewise be subject to a later attack on the ground of lack of subject-matter jurisdiction or (2) the Court of Appeals is in error in holding that subject-matter jurisdiction previously litigated in Nebraska may now be relitigated. The respondent in arguing that the decision of the Court of Appeals herein would determine the issue necessarily admits that the Court of Appeals' decision is incorrect.

Neither *Treinies v. Sunshine Mining Co.*, 308 U. S. 66, 84 L. ed. 85, 60 S. Ct. 44, nor *United States v.* 171.74 *acres of land, etc.*, D. C. Neb., 206 F. Supp. 322, relied on by respondent support a view that subject matter jurisdiction having once been litigated may be relitigated in another court one more time but not a third or fourth time. Rather they support the rule that subject-matter

jurisdiction having been fully litigated between the parties *may not be relitigated at all.* The ultimate conclusion in Treinies that the Idaho court's determination on subject-matter jurisdiction was res judicata was necessarily premised on the fact that the issue once determined could not be relitigated. As previously pointed out at page 20, supra, this Court held in the Treinies case that the Idaho judgment was res judicata even though the Idaho court may have *erroneously* failed to give full faith and credit to the Washington judgment, and the Court pointed out that if the Idaho court erred the right to review that error was by appeal in the Idaho case.

The petitioners herein are attacking the decision of the Court of Appeals directly and not collaterally and we respectfully submit that the holding of that court that the issue of subject-matter jurisdiction may be relitigated is in direct conflict with *Treinies v. Sunshine Mining Co.*, supra, and *United States v.* 171.74 *acres of land, etc.*, supra.[1]

**Full Faith and Credit**

In this title action, based as it is on the identical matter involved in the previous Nebraska suit to quiet title with each party reversed as to position as plaintiff or defendant, the issues of full faith and credit and res judicata necessarily overlap to a great extent, so that authorities applicable to one issue are often applicable likewise to the other. We now discuss the full faith and credit issue and insofar as possible we shall avoid repe-

1. United States v. 171.74 acres of land, etc., was affirmed by the Court of Appeals on June 3, 1963. See Schroeder v. 171.74 acres of land, more or less, 318 F. 2d 311.

tition of authorities previously discussed under the res judicata issue.

The Court of Appeals made short shrift of the petitioners' contention that the judgment of the Nebraska Supreme Court in *Durfee v. Keiffer* (R. 19), 1959, 168 Neb. 272, 95 N. W. 2d 618, is entitled to full faith and credit in this case. The court held categorically that the full faith and credit clause does not preclude a second forum's inquiry into questions of the first forum's personal or subject-matter jurisdiction. But an examination of the cases cited to support the rule announced discloses that in none of them was the jurisdictional question actually litigated in the first court. Furthermore, the rule announced by this Court in those cases specifically limits the application of the rule permitting a second court to make an independent determination of the first court's jurisdiction to cases in which such jurisdiction *has not been litigated* by the parties who subsequently seek to attack it. We proceed to discuss the decisions relied on by the Court of Appeals.

*Thompson v. Whitman*, 1874, 85 U. S. (18 Wall.) 457, 21 L. ed. 897, held that the record of a judgment rendered in one state is not conclusive as to the facts necessary to give that court jurisdiction and may be inquired into in a subsequent suit in the courts of another state notwithstanding such record. Thus, this court at page 469 of 85 U. S. (18 Wall.), page 902 of 21 L. ed. concluded:

> "On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provision of the 4th Article of the Constitution and the

law of 1790, and notwithstanding the averments contained in the record of the judgment itself."

The Thompson case does not reach the problem presented where not only does the record *recite* necessary jurisdictional facts but also affirmatively discloses that the jurisdictional matters *were actually litigated by the parties*. Decisions on that matter were to come later.

The problem presently considered is likewise not within the scope of *Grover & Baker Sewing Machine Co. v. Radcliffe*, 1890, 137 U.S. 287, 34 L. ed. 670, 11 S. Ct. 92. There the holding is that a personal judgment is without validity if rendered by default in a state court action on a money demand against a nonresident of the state, upon whom no personal service of process within the state was had. In Grover, the action was upon a judgment of a sister state and the defendant was permitted to set up as a defense want of jurisdiction in that he was not an inhabitant of the state rendering the judgment, had not been served with process, and did not enter his appearance. Quite obviously the question of jurisdiction had not been litigated between the parties in the original action.

*Adam v. Saenger*, 1938, 303 U.S. 59, 82 L. ed. 649, 58 S. Ct. 454, was a case which in fact specifically recognized the legal principle applicable in the case at bar.

The Adam case involved a Texas action upon a California judgment taken by default on a cross-action. It appears that following the entry of the California judgment a motion to open the default on the ground that the cross-complaint had not in fact been served upon the plaintiff's attorney was denied. This court held that it

was proper for the Texas courts in the subsequent action on the judgment to inquire into the further question of the validity of the service on the attorney, whether that question was one of fact or law, *because that question had not been litigated in the California suit.*

In *Adam v. Saenger*, supra, at page 62 of 303 U.S., pages 651, 652 of 82 L. ed., this Court said:

> "By Rev. Stat. § 905, 28 U. S. C. A. § 687, enacted under authority of the full faith and credit clause, Art. 4, § 1 of the Constitution, the duly attested record of the judgment of a state is entitled to such faith and credit in every court within the United States as it has by law or usage in the state from which it is taken. If it appears on its face to be a record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself. Hanley v. Donoghue, 116 U. S. 1, 29 L. ed. 535, 6 S. Ct. 242; Knowles v. Logansport Gaslight & Coke Co., 19 Wall. 58, 22 L. ed. 70; Settlemier v. Sullivan, 97 U. S. 444, 24 L. ed. 1110. But in a suit upon the judgment of another state the jurisdiction of the court which rendered it is open to judicial inquiry. Chicago L. Ins. Co. v. Cherry, 244 U. S. 25, 61 L. ed. 966, 37 S. Ct. 492, and *when the matter of fact or law on which jurisdiction depends was not litigated in the original suit* it is a matter to be adjudicated in the suit founded upon the judgment. Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897. Here the fact of the service of the complaint upon the attorney is alleged by the petitioner and admitted by the demurrer, but the court's conclusion that the California court was without jurisdiction, resting in part upon its construction of the California statutes, presents an issue not litigated in the California suit which must be determined in the present one." [Emphasis added.]

*Milliken v. Meyer*, 1940, 311 U. S. 457, 85 L. ed. 278, 61 S. Ct. 339, presents another default situation in which it is recognized that an independent determination of jurisdiction of the original court is proper, although in Milliken it was held that there was personal jurisdiction obtained in the first instance.

In Milliken a default judgment against a defendant was entered in Wyoming, based upon extra-territorial service of process, served pursuant to Wyoming statutes regarding substituted service upon those domiciled within the state. Subsequently the defaulting defendant brought an action in Colorado in which he attacked the Wyoming judgment for want of jurisdiction of his person. The Milliken decision does not touch upon the principle urged by petitioners herein. The jurisdictional question determined by the Colorado trial court and by this Court had not been litigated in the earlier Wyoming case, and therefore the independent determination was proper.

*Western Union Telegraph Co. v. Pennsylvania*, 1961, 368 U. S. 71, 7 L. ed. 2d 139, 82 S. Ct. 199, in no way supports a conclusion that the Nebraska Supreme Court's judgment is not entitled to full faith and credit herein. In the first place the Western Union case did not involve an attempt to redetermine issues previously litigated. It came to this Court by direct appeal from the judgment of the Supreme Court of Pennsylvania. Secondly, the opinion itself, instead of supporting the decision under review, serves to point up its fundamental error.

Western Union, a New York corporation with principal place of business in that state and offices in all others and throughout the world, held a substantial

amount of undisbursed money arising out of money orders bought in Pennsylvania offices to be transmitted to payees chiefly in other states, including New York. As against the company's objection that Pennsylvania had no right to ownership of these intangibles the trial court in Pennsylvania declared that the unclaimed obligations escheated to the state. The Supreme Court of Pennsylvania affirmed, 400 Pa. 337, 162 A. 2d 617. On appeal this Court reversed, holding (1) that the Pennsylvania escheat judgment violated due process because Pennsylvania had no power to protect the company from other claims including the claim of New York, that these obligations were subject to escheat under their laws and (2) that the proper forum to settle controversies between the different states over the right to escheat intangibles was the Supreme Court of the United States.

The basis for the judgment in the Western Union case was the fact that the other claimants were not parties to the action and could not be made parties and therefore their claims could not be cut off in the Pennsylvania litigation. In the absence of power of the Pennsylvania courts to protect Western Union from these other claims, the Pennsylvania judgment denied due process to Western Union; hence the reversal on direct appeal from the judgment of the Supreme Court of Pennsylvania.

In Western Union this Court does not suggest that as between Western Union and Pennsylvania the Pennsylvania judgment if permitted to stand would not be entitled to full faith and credit in other states. This Court merely accorded Western Union protection under the due process clause against subsequent claims of those who were not parties to the Pennsylvania action and who

therefore would not be bound by the Pennsylvania judgment either on the question of subject-matter jurisdiction or the merits of the case.

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We turn to cases which affirmatively support the rule that full faith and credit, like res judicata, applies to jurisdictional questions actually litigated between the parties in the first action.

*Chicago Life Insurance Co. v. Cherry*, 1917, 244 U. S. 25, 61 L. ed. 966, 37 S. Ct. 492, was an Illinois suit on a Tennessee judgment against certain insurance companies. The defense was that the defendant companies had not been validly served with process in Tennessee and that the Tennessee judgment was void. The plaintiff showed in reply that this defense was urged in Tennessee by pleas in abatement, that the decision was for the plaintiff and that the judgment was affirmed in the higher courts of Tennessee. A judgment for plaintiff in the Illinois action was affirmed by the Appellate Court of Illinois and certiorari was denied by the Supreme Court of that state. In this Court the insurance companies urged that the Illinois judgment deprived them of their property without due process of law. This Court held that the Illinois judgment did not take the insurance companies' property without due process of law for the Illinois judgment rested upon the view (right or wrong) that the issue of jurisdiction over the parties was raised and adjudicated after full hearing in Tennessee. This Court also pointed out that if the Tennessee judgment had been declared void in Illinois it might have been called upon to decide whether such judgment had been given

due faith and credit, but that the decision upholding it did not require further Supreme Court attention.

In the Chicago Life Insurance Co. case this Court said, at page 30 of 244 U. S., pages 969, 970 of 61 L. ed.:

> "• • • That a party that has taken the question of jurisdiction to a higher court is bound by its decision was held in Forsyth v. Hammond, 166 U. S. 506, 517, 41 L. ed. 1095, 1099, 17 Sup. Ct. Rep. 665. It can be no otherwise when a court so decides as to proceedings in another state. It may be mistaken upon what to it is matter of fact, the law of the other state. But a mere mistake of that kind is not a denial of due process of law. • • • If the Tennessee judgment had been declared void in Illinois, this court might have been called upon to decide whether it had been given due faith and credit. National Exch. Bank v. Wiley, 195 U. S. 257, 49 L. ed. 184, 25 Sup. Ct. Rep. 70. But a decision upholding it upon the ground taken in the present case does not require us to review the Tennessee decision or to go further than we have gone."

In *Davis v. Davis*, 1938, 305 U. S. 32, 83 L. ed. 26, 59 S. Ct. 3, petitioner had obtained a decree in the District of Columbia granting him a divorce a mensa et thoro. Subsequently petitioner obtained an absolute divorce in Virginia. In the Virginia suit process was served personally upon respondent in the District of Columbia and respondent challenged the jurisdiction of the Virginia court on the ground that neither party had maintained a residence in Virginia for the required period prior to commencement of the suit, that the residence petitioner attempted to establish was for the sole purpose of creating jurisdiction of the court to hear the divorce suit, was a fraud on the court and was not "residence" in

contemplation of law. The Virginia court held that petitioner had maintained a residence in Virginia for the requisite time and that the court had jurisdiction of the subject matter and of the parties.

A subsequent application in the District of Columbia case for modification of the alimony provisions of the decree of divorce a mensa et thoro was denied and the Court of Appeals affirmed that determination. This Court reversed, and held that the determination of the Virginia court regarding subject matter jurisdiction was conclusive and was entitled to full faith and credit.

In the Davis case at pages 39, 40 of 305 U. S. and pages 29, 30 of 83 L. ed., it is said:

> "Art. 4, § 1, requires that judicial proceedings in each state shall be given full faith and credit in the courts of every other state. The Act of May 26, 1790, 1 Stat. at L. 122, Chap. 11, as amended, Rev. Stat. § 905, 28 U. S. C. A. § 687, declares that judicial proceedings authenticated as there provided shall have such faith and credit given to them in every 'court within the United States as they have by law or usage in the courts of the State from which they are taken'. Thus Congress rightly interpreted the clause to mean not some but full credit. Haddock v. Haddock, supra (201 U. S. 567, 50 L. ed. 868, 26 S. Ct. 525, 5 Ann. Cas. 1). The Act extended the rule of the Constitution to all courts, Federal as well as State. Mills v. Duryee, 7 Cranch, 481, 485, 3 L. ed. 411, 413.
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> "As to petitioner's domicile for divorce and his standing to invoke jurisdiction of the Virginia Court, its finding that he was a bona fide resident of that State for the required time is binding upon respondent in the courts of the District. She may not say that he was not entitled to sue for divorce in the

state court, for she appeared there and by plea put in issue his allegation as to domicile, introduced evidence to show it false, took exceptions to the commissioner's report and sought to have the court sustain them and uphold her plea. Plainly, the determination of the decree upon that point is effective for all purposes in this litigation. Baldwin v. Iowa State Traveling Men's Asso., 283 U. S. 522, 525, 526, 75 L. ed. 1244, 1246, 1247, 51 S. Ct. 517."

*Williams v. North Carolina,* 1945, 325 U. S. 226, 89 L. ed. 1577, 65 S. Ct. 1092, involved an attack on a Nevada divorce decree by North Carolina in a prosecution for bigamous cohabitation. This Court declined to apply the rule applicable herein to North Carolina because it had not been a party to the Nevada suit, but the Court nevertheless reiterated that rule as follows, l. c. 325 U. S. 230, 89 L. ed. 1582:

"It is one thing to reopen an issue that has been settled, after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties. Forsyth v. Hammond, 166 U. S. 506, 517, 41 L. ed. 1095, 1099, 17 S. Ct. 665; Chicago L. Ins. Co. v. Cherry, 244 U. S. 25, 30, 61 L. ed. 966, 969, 37 S. Ct. 492; Davis v. Davis, supra."

*Forsyth v. Hammond,* supra, is cited in the Williams case in support of the above quoted portion of the opinion. The Forsyth case, as well as *Stoll v. Gottlieb,* supra, fully support the principle applicable to the present discussion. Strictly speaking they involve res judicata rather than full faith and credit for in those cases the second action was brought in the same state as the first but in the local federal court rather than in the state court in which the first action was maintained. These cases

have been treated in some detail in our argument directed to res judicata.

In *Sherrer v. Sherrer*, 1948, 334 U. S. 343, 92 L. ed. 1429, 68 S. Ct. 1087, it was held that where a husband personally appeared and participated in a contested divorce proceeding in Florida and in that litigation it was determined that the wife had acquired bona fide residence in Florida and a divorce was granted, the Florida judgment was res judicata, and entitled to full faith and credit in Massachusetts wherein both parties had originally resided and to which state the wife subsequently returned. In the opinion it is said, l. c., 334 U. S. 348-350, 92 L. ed. 1434-1436:

> "It is clear that respondent was afforded his day in court with respect to every issue involved in the litigation, including the jurisdictional issue of petitioner's domicile. Under such circumstances, there is nothing in the concept of due process which demands that a defendant be afforded a second opportunity to litigate the existence of jurisdictional facts. Chicago L. Ins. Co. v. Cherry, 244 U. S. 25, 61 L. ed. 966, 37 S. Ct. 492 (1917); Baldwin v. Iowa State Traveling Men's Asso., 283 U. S. 522, 75 L. ed. 1244, 51 S. Ct. 517 (1931).
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> * * *
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> "* * * Insofar as cases originating in the federal courts are concerned, the rule has evolved that the doctrine of *res judicata* applies to adjudications relating either to jurisdiction of the person or of the subject matter where such adjudications have been made in proceedings in which those questions were in issue and in which the parties were given full opportunity to litigate. * * *
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> "This Court has also held that the doctrine of *res judicata* must be applied to questions of juris-

diction in cases arising in state courts involving the application of the full faith and credit clause where, under the law of the state in which the original judgment was rendered, such adjudications are not susceptible to collateral attack."

We submit that enough has been said to demonstrate that the effect of an actual litigation in one court of the question of jurisdiction either of the person or of the subject matter, in a subsequent action between the parties in another court is the same whether the issue is simply one of res judicata or whether the question of full faith and credit arises. In either instance the first judgment is conclusive on jurisdictional questions if the parties have had their day in court and have fully litigated the jurisdictional issues.

## Law Review Articles

Our attention has recently been called to two law review comments concerning the Court of Appeals' decision in the instant case. One of these comments appears in 11 Kansas Law Review, page 544 (May, 1963, No. 4). The other is in 111 Pennsylvania Law Review, page 1218 (June, 1963, No. 8).

While the law review articles do not approach the case in precisely the same manner both are well written and interesting to read. They have one thing in common, that is, disagreement with the opinion of the Court of Appeals.

Rather than to epitomize or quote from these articles in our brief in chief, we have determined to have them printed in toto as an appendix hereto, with the thought in mind of furnishing to the Court in convenient form the views of these disinterested observers. The Kansas ar-

ticle appears at page 51, infra, and the Pennsylvania article at page 64, infra.

## CONCLUSION

Under the doctrine of res judicata the issue of jurisdiction of the subject matter of the controversy between petitioners and respondent was conclusively established by the decision and judgment of the Nebraska Supreme Court in *Durfee v. Keiffer*, 168 Neb. 272, 95 N. W. 2d 618 (R. 17-29). That judgment, based on a determination of a fact issue fully litigated between the parties in the District Court of Richardson County, Nebraska and again on trial de novo on an appeal taken by respondent herself to the Nebraska Supreme Court, may not be attacked collaterally in Nebraska courts, state or federal. Likewise it may not be attacked in the courts of other states and is entitled to full faith and credit therein. Under the Constitution (Const. U. S. Article IV, Sec. 1, U. S. C. A. Const. Article IV, Sec. 1) as implemented by Act of Congress (Act June 25, 1948, c. 646, 62 Stat. 947, 28 U. S. C. A. Sec. 1738) the collateral attack attempted in Missouri in the present case must fail.

Any supposed policy against a court allegedly acting beyond its jurisdiction has no force and cannot outweigh the policy of conclusiveness of an adjudication as reflected in the res judicata doctrine, under the circumstances of this case. The issue determined in Nebraska was one of fact concerning whether this border-line land remained in Nebraska where it was admittedly located to start with, or whether it shifted by accretion to Missouri. Nebraska courts are as competent to decide this issue as are Missouri courts.

No court is infallible when determining disputed fact questions. But if one assumes that the Nebraska Supreme Court erroneously determined the issue involved herein and thereby took respondent's land without due process of law, respondent's remedy was review in this Court of the judgment of the Nebraska Supreme Court whose jurisdiction respondent invoked. No such review was sought. No doubt respondent, who is represented by eminent counsel, would have petitioned this Court for certiorari if it had been even surmised that the Nebraska court acted arbitrarily and thereby deprived respondent of property without due process of law.

We submit that Judge Duncan correctly applied res judicata and refused to permit this attempted collateral attack, and that the Court of Appeals erroneously held otherwise and refused full faith and credit to the Nebraska judgment. Petitioners respectfully pray that the judgment of the Court of Appeals be reversed and the cause remanded with directions to affirm the judgment of the district court holding that the Nebraska judgment is res judicata and is conclusive in this case.

Respectfully submitted,

HAROLD W. KAUFFMAN,
730 Farm Credit Building
Omaha 2, Nebraska

ALFRED A. FIEDLER,
300 Keeline Building
Omaha 2, Nebraska

AUGUST ROSS,
1405 City National Bank Building
Omaha 2, Nebraska

*Attorneys for Petitioners.*

## PROOF OF SERVICE

I, Harold W. Kauffman, one of the attorneys for petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on August 16, 1963, I served copies of the foregoing Brief of Petitioners upon respondent by depositing the same in a United States mailbox with first class postage prepaid; addressed to Robert A. Brown, Tootle-Enright Bank Building, St. Joseph 2, Missouri, such being the post office address of said counsel of record for respondent.

Harold W. Kauffman

HAROLD W. KAUFFMAN,
730 Farm Credit Building
Omaha 2, Nebraska
*Counsel for Petitioners.*

# APPENDIX

11 KANSAS LAW REVIEW (Pages 544-551, inclusive)

(May 1963, Number 4)

## THE APPLICABILITY OF RES JUDICATA TO DETERMINATIONS OF 'SUBJECT MATTER' JURISDICTION IN CONFLICT OF LAW CASES

### Introduction

A problem long troubling judges and lawyers engaged in interstate litigation is the propriety of collateral attack upon jurisdictional issues decided in the forum of a sister state or in a federal court. Immediately, questions concerning the applicability of full faith and credit and the doctrine of res judicata to "subject matter" jurisdiction are raised. Presenting the issue under analysis far better than any hypothetical contrivance, is the recent case of *Duke v. Durfee*.[1]

### Duke v. Durfee

A title to land lying in the Missouri River bottom was derived by Julia Duke, a resident of Missouri, from a swamp land patent issued by the State of Missouri. The State of Nebraska, through a tax foreclosure sale and sheriff's deed, issued a title to the same property to Gene Durfee, a Nebraska resident. The reason for the dual claim to ownership hinged upon a factual question concerning the method of course changes made by the river. If the river had changed its course by accretion, the boundary moved with the river and the land was in Missouri. If, on the other hand, the river had changed its course by avulsion, the boundary did not change and the land remained in Nebraska. Durfee brought a quiet title action in Nebraska and Duke, personally served, appeared and litigated all questions including jurisdictional issues.

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1. 308 F. 2d 209 (8th Cir. 1962).

The Nebraska trial court held that the land was in Nebraska, and therefore, the court had jurisdiction to render the judgment. Title was quieted in Durfee and the decision was affirmed on appeal in Nebraska. Following the unsuccessful defense of the Nebraska proceedings, Duke went home to Missouri and, in the courts of that state, began an action to quiet title in himself. Defendant, Durfee, removed to the Federal District Court. In the federal court action, the trial judge held that the land was in Missouri, but that he was bound by Nebraska's findings of jurisdictional facts on the basis of res judicata. Duke then perfected the instant appeal to the Eighth Circuit Court of Appeals where that court *held*, that the jurisdictional issue was not closed by res judicata and the judgment could be collaterally attacked.[2]

### Full Faith and Credit and Res Judicata

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[3] The foregoing provision of the Constitution of the United States, together with the implementing statute which provides that such acts, records and proceedings are to have the "same full faith and credit in every court . . . as they have by law or usage in the courts . . . from which they are taken,"[4] gives rise to the American concept of a "national jurisprudence." An early exception to the full faith and credit provision was made in *Thompson v. Whitman*.[5] In this landmark decision, the court concluded that the framers of the Constitution did not intend that faith and credit be given to decisions of sister states where the court rendering the judgment lacked jurisdiction. Further, while the records of state courts are often granted verity within that particular state, this concept was held to have "no extra-territorial effect."[6] Therefore, it was made clear that

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2. Ibid.
3. U. S. Const., Art. IV, § 1.
4. 28 U. S. C. § 1738 (1948).
5. 85 U. S. (18 Wall.) 457 (1874).
6. Ibid. See also, Riley v. New York Trust Co., 315 U. S. 343 (1942).

inquiry could be had into the jurisdiction of the first forum, regardless of recitations of jurisdiction in the judgment record, before full faith and credit was required.

While it was established that there could be inquiry into the jurisdiction of the first forum, until the *Baldwin*[7] case the criteria by which the second forum was to determine the validity of the first forum's judgment were uncertain.[8] The *Baldwin* case set the matter at rest at least insofar as jurisdiction over the person was concerned. The court stated:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why the doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."[9]

Thus, "the political question of jurisdiction was to be determined by the policy behind the doctrine of res judicata."[10]

A factor affecting whether or not res judicata is to be applied to the judgment of the first forum concerning the existence of jurisdiction is the extent of the participation, in the first action, of the party seeking to attack the judgment in the second forum. More explicitly, did the judgment go by default, were the merits litigated without reference to the jurisdictional question, or was the question of the court's jurisdiction actively litigated? The Supreme Court has applied the doctrine of res judicata in

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7. Baldwin v. Iowa State Traveling Men's Ass'n, 283 U. S. 522 (1931).
8. Note, 40 Colum. L. Rev. 523 (1940); Gavit, Jurisdiction of the Subject Matter and Res Judicata, 80 U. Pa. L. Rev. 386 (1932).
9. Baldwin v. Iowa State Traveling Men's Ass'n, supra, note 7, at 525-26.
10. Colum. L. Rev., supra note 8, at 524.

the federal courts to cases where the issue involved was not litigated, but merely could have been.[11] Despite suggestions to the contrary,[12] however, this phase of the doctrine has not been applied to jurisdictional issues in the conflict of laws area.[13] It seems highly unlikely that the doctrine will be extended in the future to conflict cases where the issue of jurisdiction was not litigated in the first forum since such an aplication would abridge the second forum's right to make inquiry into the jurisdictional question, a right which has been held to be "beyond question."[14]

A further and more tenuous distinction in the application of res judicata has traditionally been made between matters of jurisdiction of the person and jurisdiction of the subject matter. This distinction seems basically to stem from the concept that jurisdiction over the person can be conferred by consent,[15] while the converse result controls in regard to subject matter jurisdiction.[16] Further complicating the issue is the varying use of, and the policy considerations which have become attached to, the term "subject matter." "Subject matter" has been used in the conflict of laws area by the Supreme Court to include the problems of the competency of the court rendering the decision as measured by its own laws and constitution;[17] the domicile of a marriage;[18] whether or not a constitutional provision has pre-empted the field from the state courts;[19] the seizure and possession of a res in a proceeding in rem;[20] and the situs of the res of an orel trust,[21] to name a few.

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11. Chicot County Drainage Dist. v. Baxter State Bank, 308 U. S. 371 (1940).
12. Note, 53 Harv. L. Rev. 652 (1940).
13. Colum. L. Rev., supra note 8.
14. Trienies v. Sunshine Mining Co., 308 U. S. 66, 78 (1939).
15. Baldwin v. Iowa State Traveling Men's Ass'n, supra note 7; Chicago Life Ins. Co. v. Cherry, 244 U. S. 25 (1917).
16. Grubb v. Public Util. Comm'n of Ohio, 281 U. S. 470, 475 (1930).
17. Thompson v. Whitman, 85 U. S. (18 Wall.) 457 (1874).
18. Davis v. Davis, 305 U. S. 32 (1938).
19. Grubb v. Public Util. Comm'n of Ohio, supra note 16.
20. Pennoyer v. Neff, 95 U. S. 714 (1878).
21. Treinies v. Sunshine Mining Co., supra note 14.

## Influence of Policy

Policy considerations involved in applying res judicata to determinations of "subject matter" jurisdiction are plentiful. Basically, they range from the state's interest that there be an end to litigation to the state's interest in retaining jurisdiction over certain controversies.[22] Both points are touched upon in *Stoll v. Gottlieb*,[23] where the court held that res judicata applied to a federal bankruptcy court's "subject matter" determination of its power to grant a surety's release in reorganization. The court said:

> "We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. . . . Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."[24]

On the other hand, speaking of policy considerations in other situations, the Court by way of dictum commented:

> "To appraise the cases dealing with status and transfer of title to real estate seems outside the scope of the present inquiry. The rule applied here may or may not be applicable in instances where the courts with jurisdiction of the later controversy are passing

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22. Colum. L. Rev., supra note 8.
23. 305 U. S. 165 (1938).
24. Id. at 172.

upon matters of status and real estate titles. It is frequently said that there are certain strictly jurisdictional facts, the existence of which is essential to the validity of proceedings and the absence of which renders the act of the court a nullity. . . . For instance, service of process in a common law action within a state, publication of notice in strict form in proceedings *in rem* against absent defendants, the appointment of an administrator for a living person, a court martial of a civilian. Upon the other hand there are quasi-jurisdictional facts, diversity of citizenship, majority of litigants, and jurisdiction of parties, a mere finding of which, regardless of actual existence, is sufficient. As to the first group it is said an adjudication may be collaterally attacked, as to the second it may not. We do not review these cases as we base our conclusion here on the fact that in an actual controversy the question of the jurisdiction over the subject matter was raised and determined adversely to the respondent. That determination is *res judicata* of that issue in this action, whether or not power to deal with the particular subject matter was strictly or quasi-jurisdictional."[25]

The doubt cast by the *Stoll* dictum remains unresolved concerning cases where the policy of the enforcing forum might be said to override the policy of res judicata and justify a denial of full faith and credit even where the jurisdictional issue was actively litigated in the first instance.[26] It should be noted at this point, however, that at least two cases with rather strong policy overtones have been held to fall under the doctrine of res judicata, policy considerations notwithstanding.[27] In the first of these two cases, Mississippi was required to enforce a gambling contract drawn in Mississippi for the reason that a Missouri court had held, erroneously, that the contract was legal in Mississippi. Notwithstanding the en-

25. Id. at 176-77.
26. Ibid.
27. Roche v. McDonald, 275 U. S. 449 (1928); Fauntleroy v. Lum, 210 U. S. 230 (1908).

forcing forum's interest in prohibiting gambling, the Missouri decision was one to which full faith and credit was owing.[28] In the second case, Washington was required to enforce one of its own judgments, on which the Washington statute of limitations had run, because Oregon had applied to it another statute when the judgment was sued upon in Oregon.[29] However, neither of these cases applied res judicata to jurisdictional issues.

Another form of policy consideration is raised by three "subject matter" cases where the res judicata concept came into conflict with the supreme law of the land. The first of these three cases involved the conclusiveness of a judgment of a bankruptcy court wherein an insurance company was adjudged an involuntary bankrupt contrary to the express terms of the federal statute which excepted insurance companies from its provisions.[30] No appeal was taken. Reviewing a subsequent action by the company to revise the judgment, the Supreme Court held that the doctrine of res judicata did not apply. The high court indicated that the policy of Congress, as announced by the statute, was stronger than res judicata and the collateral attack was permitted.[31] The second case to deal with this problem began with a federal court action brought by the United States on behalf of certain Indian tribes to recover rent from a bankrupt.[32] In its answer, the bankrupt filed a cross-claim for affirmative relief to recover a claim it had against the Indian tribes. The trial court granted a money judgment in favor of the bankrupt and against the United States on the cross-claim. Completely ignoring this judgment, from which

28. Fauntleroy v. Lum, supra note 27.
29. Roche v. McDonald, supra note 27.
30. Vallely v. Northern Fire Ins. Co., 254 U. S. 348 (1920).
31. It should be noted that while the Court's language justifies the interpretation given here, that res judicata cannot prevail when it conflicts with the supreme law, the Court in Stoll v. Gottlieb, 305 U. S. 165, 175-76, limited the reach of the decision by commenting that the actual basis for the decision in the Vallely case was that the jurisdictional issue was not litigated in the first forum.
32. United States v. United States Fid. & Guar. Co., 309 U. S. 506 (1940).

no appeal was taken, the United States filed a subsequent action on the same facts to recover against the bankrupt's surety, this time in a state court. The earlier judgment was set up by the surety as a defense, but the Supreme Court on appeal held that the doctrine of res judicata could not overcome sovereign immunity. Inasmuch as Congress had not consented to the recovery, the first suit against the bankrupt was not res judicata in the subsequent action against the surety. The third case, again involving bankruptcy, was *Kalb v. Feuerstein*.[33] In that case a farmer began an action in federal court to gain composition and an extension of time in which to pay his debts under the Frazier-Lemke Act. While this action was pending, a mortgagee foreclosed on the farmer's property in the state courts. The Supreme Court, in passing on the issue of whether or not the state court's judgment was res judicata and as such entitled to full faith and credit in the federal court action, said:

> "It is generally true that a judgment by a court of competent jurisdiction bears a presumption of regularity and is not thereafter subject to collateral attack. But Congress, because its power over the subject of bankruptcy is plenary, may by specific bankruptcy legislation create an exception to that principle and render judicial acts taken with respect to the person or property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally.[34]

It may be significant to note that in none of these cases was the question of jurisdiction actually litigated in the first forum. Judging from the Court's language, however, it may very well be that doctrines of federal pre-emption and sovereign immunity will control over res judicata in subsequent cases where the issue is actually litigated in the first forum.

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33. 308 U. S. 433 (1940).
34. Kalb v. Feuerstein, 308 U. S. 433, 438-39 (1940).

## Res Judicata Applied to "Subject Matter" Jurisdiction

A case which seems to be authority for the proposition that "subject matter" jurisdiction, once litigated, is governed by res judicata in a conflict of laws situation is *Trienies v. Sunshine Mining Co.*[35] The case is strong because of its factual intricacies which result in the second forum deciding the jurisdiction question for the first forum, perhaps erroneously, and upon that second judgment, the first forum was held estopped, in an attempted third action, to alter the second forum's decree on the basis of res judicata. The language of *Trienies* is broad, "Even where the decision against the validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court. One trial of an issue is enough. The principles of res judicata apply to questions of jurisdiction as well as to other issues, as well to jurisdiction of the subject matter as of the parties."[36] Despite this language, and evidently relying upon the limiting dictum in *Stoll v. Gottlieb*,[37] the court in the recent *Duke v. Durfee* case does not apply res judicata.

While there are many policy factors involved in the matter of divorce which might be said to constitute it *sui generis*, it has been clear since *Davis v. Davis*[38] that the "subject matter" question of the legal residence of one of the parties, and hence the situs of the res of the marriage, once actively litigated is res judicata and no longer subject to collateral attack in the conflict situation. By comparison it would seem that the situs of the res of a marriage[39] and the situs of the res of an oral trust[40] have been placed in the same class by the Court when making the policy determination as to whether or not collateral attack is to be allowed.

A hidden factor which seems to underlie the *Stoll* dictum[41] and the decision in the *Duke* case is reflected in the

35. Supra note 14.
36. Id, at 78.
37. Stoll v. Gottlieb, 305 U. S. 165, 176-77 (1938).
38. Supra note 18.
39. Ibid.
40. Trienies v. Sunshine Mining Co., supra note 14.
41. Stoll v. Gottlieb, 305 U. S. 165, 176-77 (1938).

caveats of both the *Restatement of Conflicts* and the *Restatement of Judgments*.[42] Both of these works declare that jurisdiction of the person, once litigated, is forever concluded to collateral attack.[43] In regard to subject matter jurisdiction, however, both circumvent a definitive rule with a statement that the outcome of a collateral attack will be based upon a balancing of "the policy underlying the doctrine of res judicata" against "the policy against permitting the court to act beyond its jurisdiction."[44] Included in this provision are five factors which the Institute feels should be considered in making a decision as to which of the two stated policies is the weightier in a given situation. These factors, leading to a conclusion that collateral attack is to be permitted are:

(a) the lack of jurisdiction over the subject matter was clear;

(b) the determination as to jurisdiction depended upon a question of law rather than fact;

(c) the court was one of limited and not of general jurisdiction;

(d) the question of jurisdiction was not actually litigated;

(e) the policy against the court's acting beyond its jurisdiction is strong.[45]

The hidden factor then would seem to be a search for "literal" rather than "legal" truth in the area of subject matter jurisdiction. In our system of jurisprudence, facts found by the court or jury are the *true* facts, legally speaking, regardless of what *actually* may have transpired

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42. Restatement, Conflict of Laws, § 451 (Supp. 1948); Restatement, Judgments § 10 (1942).

43. Restatement, Conflict of Laws, § 451(1) (Supp. 1948); Restatement, Judgments, § 9 (1942).

44. Restatement, Conflict of Laws, § 451(2) (Supp. 1948); Restatement, Judgments, § 10 (1942).

45. Ibid.

or what the situation might *actually* have been.[46] With state boundaries becoming less significant each day in legal contemplation, a serious doubt may be cast upon the necessity for excepting jurisdictional facts, once litigated, from our concept of "legal truth."

## A New Book

It would therefore appear that the term "subject matter jurisdiction," clouded by its various meanings and the engrafting of subtle policy considerations, has become more of a *shibboleth* than a tool for analysis. Through overgeneralizations, the words specifically mean little if anything. Perhaps then, a new system of analysis is in order for the entire area of jurisdictional problems with particular reference to conflict of laws situations and the application of res judicata through full faith and credit. Such a system might be developed more in terms of the various problems encountered than in terms of which labels, already shrouded with hidden meaning, might be applied. Given the proposition that the question of jurisdiction, be it personal or "subject matter," has been fully litigated in the first forum, the analysis should be in terms of: What is alleged to have been the error in the findings of the first forum? As a matter of policy, should res judicata apply to situations where the court is alleged to have erroneously held it had: (1) competency under its own constitution and statutes to hear and decide the case; (2) a constitutional basis for the exercise of its power over the case (domicile, substantial contact, situs of the res, physical presence, etc.); (3) jurisdiction over persons or things through the exercise of proper process (service of process on persons or attachment of the res in an action in rem, for example); or, (4) jurisdiction to render the judgment in the face of contrary provisions of the supreme law of the land? It is submit-

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46. Res Judicata Facit Ex Albo, Nigrum: Ex Nigro, Album: Ex Curvo, Rectum: Ex Recto, Curvum. A thing adjudged (the solemn judgment of a court) makes white, black; black, white; the crooked, straight; the straight, crooked. Black, Law Dictionary (4th ed. 1951).

ted that the old cases in this area can be fitted into this framework with the same results and yet give a clearer understanding and more certain predictability for future conduct.

### Duke Under the Knife

*Duke v. Durfee* presents the problem of applying res judicata to "subject matter" jurisdiction problems in what might be termed its most emotional or dramatic setting. Involved herein is a piece of real estate (a fact which alone seemed significant to the court) which is situated on or near the boundary line between two states. As might be expected, the court returns to concepts of exercising jurisdiction over property outside the territorial limits of the forum, so poignantly declared void, by dictum, in *Pennoyer*.[47] Again, it seems the court is searching for some form of "actual" truth rather than adhering to time-tested principles of "legal" truth based upon supported findings of fact at the trial court level. Further, the court separates concepts of full faith and credit from the doctrine of res judicata and concludes that there is no issue regarding the former, but merely an application of the latter. This reasoning appears to be erroneous inasmuch as it is through the full faith and credit clause that the doctrine of res judicata finds its place in "national jurisprudence."[48] In reasoning that the doctrine of full faith and credit does not "preclude a second forum's inquiry into questions of the first court's personal or subject-matter jurisdiction,"[49] the court seems to disregard the earlier decisions which conclude that after the inquiry is made, and it has been determined that the issue was litigated in the first forum, the doctrine of res judicata precludes *further* inquiry into the jurisdictional facts and issues.

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47. Pennoyer v. Neff, supra note 20, at 722-23.

48. Riley v. New York Trust Co., 315 U.S. 343, 349 (1942); Rashid, The Full Faith And Credit Clause: Collateral Attack of Jurisdictional Issues, 36 Geo. L. J. 154, 180 (1947-48).

49. Duke v. Durfee, supra note 1, at 212.

The court engages in a chronological discussion of Supreme Court cases involving the question of res judicata and its application to the conflict of laws problem, but no attempt is made to classify the decisions in terms of what actual problems were involved in the cases.

In analyzing the *Duke* case in terms of the tests established by the *Restatement*,[50] the court readily ascertained that the first four of the five tests, indicated by the caveat as significant, were against permitting collateral attack. Only the test concerning the policy of a court acting beyond its jurisdiction was, therefore, given relevance. In terms of policy, however, there would seem to be no serious problem involved in the application of res judicata to this case. The decision in the first forum does not establish the boundary line and is not binding upon the states.[51] Furthermore, by analogy, it is difficult to determine why real estate should be of more importance, policy wise, to the enforcing forum than the situs of the res of an oral trust,[52] or the situs of the res of a marriage.[53] Consistent with precedent, it would also appear that in cases where a party has either voluntarily submitted his controversy to a forum, or appears and fully litigates the question of jurisdiction in an action brought against him, without appealing from an adverse decree, the policy behind upholding the judgment's sanctity and the need for certainty outweigh other considerations.

## Conclusion

The foregoing analysis of the decision in the *Duke* case has been based upon contemporary terminology and usages. Should the problem of jurisdiction in conflict of laws areas be reclassified, as hereinbefore suggested, it is submitted that this case would fall into the proposed second category, namely: Did the first forum have a

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50. Restatement, Conflict of Laws, § 451(2) (Supp. 1948).
51. Cf. Land v. Dollar, 330 U. S. 731 (1947); United States v. Lee, 106 U. S. 196 (1882).
52. Trienies v. Sunshine Mining Co., supra note 14.
53. Davis v. Davis, supra note 18.

constitutional basis for exercising jurisdiction over the matter at issue? Where the issue was fully and freely litigated in the first forum, it has already been shown that the court has freely applied the doctrine of res judicata to this constitutional basis category in the area of jurisdiction of the person, jurisdiction over the res of an oral trust, jurisdiction over the res of a marriage, and in the field of "substantial contact" required to give courts jurisdiction over corporations. There appears no reason which would justify an exception for this case to this consistent line of reasoning. The remedy is clearly appeal, if error was committed in the first forum's factual conclusion, not collateral attack.

Certiorari has been granted the *Duke* case by the Supreme Court.[54] It is suggested that a new approach, casting aside meaningless labels, would be in order to better equip the bench and bar for its task of dealing with the complex problems of interstate litigation which daily increase.

TERRY L. BULLOCK

54. Durfee v. Duke, cert. granted, 83 Sup. Ct. 509 (1963).

111 PENNSYLVANIA LAW REVIEW (1218-1226, incl.)
(June 1963, Number 8)

CONFLICT OF LAWS—STATE'S DETERMINATION OF SUBJECT MATTER JURISDICTION OVER BORDER LAND IS OPEN TO COLLATERAL ATTACK IN BORDERING STATE

*N* brought an action in the Nebraska state courts to quiet title to land situated in the Missouri River bottoms close to the Nebraska-Missouri boundary line.[1] *N*'s title

1. The boundary between Missouri and Nebraska is the middle of the main channel of the Missouri River. Instant case at 210.

was based on a Nebraska tax sale deed. *M*, who had possession of the land and a title derived from a swamp patent issued by Missouri, appeared generally in the action and challenged the court's jurisdiction over the subject matter, alleging that the land was located in Missouri. The trial court found that the land was in Nebraska and quieted title in *N*. After a trial de novo, the Nebraska Supreme Court affirmed.[2] *M* then instituted an action in the Missouri courts to quiet title to the same land. *N* removed this action to the federal district court, which dismissed the action on the ground that the Nebraska judgment was res judicata. The Court of Appeals for the Eighth Circuit reversed, holding that since the Nebraska judgment indirectly affected Missouri's alleged sovereign interest in the land, it was "not unreasonable or improper" for the district court in Missouri to "satisfy itself as to the first forum's subject-matter jurisdiction."[3] *Duke v. Durfee*, 308 F. 2d 209 (8th Cir. 1962), *cert. granted*, 371 U. S. 946 (1963).

Although the Supreme Court at first did not view the full faith and credit clause[4] as barring re-examination by

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2. Durfee v. Keiffer, 168 Neb. 272, 95 N. W. 2d 618 (1959). The issue of jurisdiction was primarily one of fact and was determinative of the controversy. Since the land was originally on the Nebraska side of the river, the court's finding that the land was still in Nebraska automatically determined that N was the rightful owner because his title was based on a Nebraska tax deed. Thus, Missouri, never having had dominion over the land, could not have conveyed any interest to M via its land patent. Id. at 280-81, 95 N. W. 2d at 624-25. The location of the boundary between the two states was set by determining whether the Missouri River had changed its course by the process of avulsion or accretion. When a river suddenly abandons its old course and seeks a new channel (avulsion), there is no change in the boundary; the boundary remains in the middle of the old channel. If, however, a river changes its channel gradually by alluvial formations (accretion), the boundary moves with the river. Nebraska v. Iowa, 143 U. S. 359 (1892).

3. Instant case at 220.

4. "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U. S. Const., Art. IV, § 1. Federal courts must give full faith and credit to state court judgments. 28 U. S. C. § 1738 (1958); Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U. S. 183, 193 (1941) (dictum).

one state of another state's jurisdictional determinations,[5] the practical need for an end to litigation of the same parties[6] has induced the Court to make local principles of res judicata, even as to jurisdictional issues, "a part of [our] national jurisprudence.'" The considerations against allowing a foreign forum's allegedly erroneous jurisdictional determination to stand must now be bal-

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5. If it was determined that the first forum did not have jurisdiction, the judgment was considered a nullity. The leading case is Thompson v. Whitman, 85 U. S. (18 Wall.) 457 (1874); there the Court, quoting Chancellor Kent, declared:

> "[I]n all instances the jurisdiction of the court rendering the judgment may be inquired into . . . . It is only when the jurisdiction of the court in another State is not impeached, either as to the subject-matter or the person, that the record of the judgment is entitled to full faith and credit. The court must have had jurisdiction not only of the cause, but of the parties, and in that case the judgment is final and conclusive."

Id. at 468.

See Bell v. Bell, 181 U. S. 175 (1901); D'Arcy v. Ketchum, 52 U. S. (11 How.) 165 (1850). See generally Ehrenzweig, Conflict of Laws, § 57, at 207-09 (1962); Boskey & Braucher, Jurisdiction and Collateral Attack: October Term, 1939, 40 Colum. L. Rev. 1006 (1940); Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Colum. L. Rev. 1 (1945); Rashid, The Full Faith and Credit Clause: Collateral Attack of Jurisdictional Issues, 36 Geo. L. J. 154 (1948).

6. The rationale for the doctrine of res judicata was given in Stoll v. Gottlieb, 305 U. S. 165, 172 (1938):

> Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

As to the personal need, see Arnold & James, Cases on Trials, Judgments & Appeals 133-36 (1936).

7. Riley v. New York Trust Co., 315 U. S. 343, 349 (1942). The Court has barred collateral attack in the following cases: Sherrer v. Sherrer, 334 U. S. 343 (1948) (subject matter jurisdiction—full faith and credit); Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381 (1940) (subject matter jurisdiction—res judicata); Treinies v. Sunshine Mining Co., 308 U. S. 66 (1939) (subject matter jurisdiction—full faith and credit); Davis v. Davis, 305 U. S. 32 (1938) (subject matter jurisdiction—full faith and credit); Stoll v. Gottlieb, 305 U. S. 165 (1938) (subject matter jurisdiction—res judicata); American Sur. Co. v. Baldwin, 287 U. S. 156 (1932) (personal jurisdiction—full faith and credit); Baldwin v. Iowa State Traveling Men's Ass'n, 283 U. S. 522 (1931) (personal jurisdiction—res judicata).

anced against the weighty considerations underlying res judicata.[8] Collateral attack will rarely be permitted even when jurisdictional issues were not previously litigated if the parties appeared generally and had full opportunity to raise such issues.[9] But, when important congressional policies are involved, the Court has developed a narrow exception to the rule and allowed inquiry into the first forum's jurisdiction over the subject matter.[10] As yet, however, it has not deemed state policy considerations sufficient to justify a collateral attack on a sister state court's determination of subject matter jurisdiction if that court had jurisdiction over the parties, although it has conceded that there could be such cases.[11]

The court in the present case summarily disposed of the full faith and credit issue, reasoning that a second forum may always inquire into the first forum's jurisdictional determinations and, therefore, that only a ques-

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8. Policy considerations in favor of allowing collateral attack outweighed the policy underlying res judicata in United States v. United States Fid. & Guar. Co., 309 U. S. 506 (1940) (sovereign immunity), and Kalb v. Feuerstein, 308 U. S. 433 (1940) (Congress' plenary power over bankruptcy); see Rashid, supra note 5, at 171-74. Compare Grubb v. Public Util. Comm'n, 281 U. S. 470 (1930) (state and federal concurrent jurisdiction over interstate commerce), and Vallely v. Northern Fire & Marine Ins. Co., 254 U. S. 348 (1920) (Congress' plenary power over bankruptcy), in which strong policy considerations were present and collateral attack was allowed. However, in both cases the Court was still applying the old theory that the jurisdiction of a foreign forum could always be questioned. Neither in Kalb nor in United States Fid. & Guar. Co. were the jurisdictional issues actually litigated in the first forum, but it seems unlikely, in light of the strong policy considerations, that prior litigation of these issues would have led to different results.

9. Chicot County Drainage Dist. v. Baxter State Bank, 308 U. S. 371 (1940); see Rashid, supra note 5, at 165-71. The Chicot principle was reaffirmed in Heiser v. Woodruff, 327 U. S. 726, 735-36 (1946).

10. See note 8 supra. But see Jackson v. Irving Trust Co., 311 U. S. 494 (1941).

11. See Sherrer v. Sherrer, 334 U. S. 343, 355 (1948) (dictum). But cf. Western Union Tel. Co. v. Pennsylvania, 368 U. S. 71 (1961); Riley v. New York Trust Co., 315 U. S. 343 (1942). In Chicago Life Ins. Co. v. Cherry, 244 U. S. 25, 30 (1917), Mr. Justice Holmes stated that if a forum's determination as to jurisdiction is so gross a mistake "as to be impossible in a rational administration of justice," other forums need not give the judgment full faith and credit.

tion of federal res judicata law was posed.[12] Not only does this decision appear incorrect,[13] but it may have been unnecessary, for either of two reasons. If, as the court seems to have assumed,[14] the case was merely a diversity action in a federal court, the court should first have looked to the law of Missouri to ascertain if that state would give effect to the Nebraska judgment without the compulsion of the full faith and credit clause.[15] Although there is no Missouri law precisely on point, the Missouri Supreme Court has held that once an issue of personal jurisdiction over a Missouri corporation has been litigated in a sister state, it cannot be relitigated in the Missouri courts.[16]

However, the present case is not merely a diversity action. The location of an interstate boundary and the adjudication of disputes between parties claiming land under conflicting grants from different states are matters

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12. Instant case at 212.

13. See text accompanying notes 4-11, supra.

14. See instant case at 212, where the court declares:
Thus, there is no full faith and credit requirement that, in the case before us, a Missouri court—and thereby the federal district court in Missouri, see Angel v. Bullington, [330 U.S. 183 (1947)] . . . — must accept the Nebraska judgment as final.

15. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

16. Hall v. Wilder Mfg. Co., 316 Mo. 812, 293 S.W. 760 (1927) (alternative holding). The case involved a New York court's determination that it had personal jurisdiction over a Missouri corporation which had specially appeared to contest jurisdiction. In barring collateral attack in the Missouri courts, the Missouri Supreme Court alternatively relied on the full faith and credit clause and on Missouri res judicata law. Undoubtedly Missouri's sovereign interest in the property involved in the present case is stronger than any interest it had in protecting the Missouri corporation in Hall. Nevertheless a federal court applying state law in a diversity suit is more restricted in its application of that law than the state supreme court, and thus, if it were presented with the factual situation in the instant case, it would probably regard the Hall case as highly persuasive authority and therefore not reach the constitutional issue.

If there is no state law on the issue of collateral attack, the Supreme Court has indicated that it is appropriate to follow the federal res judicata law. Treinies v. Sunshine Mining Co., 308 U.S. 66, 78 n. 26 (1939).

of federal concern.[17] Since it would be inappropriate to apply one state's law in preference to that of the other, federal common law, not state law, should provide the rules for decision,[18] both as to the principal substantive issue and to ancillary matters, such as res judicata.[19] On

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17. In Cissna v. Tennessee, 246 U. S. 289 (1918), the state sought to enjoin Cissna, a private party, from removing timber from certain lands which were originally part of the Mississippi River bed. Cissna challenged the Tennessee court's jurisdiction on the ground that the land was in Arkansas. The court found the land to be in Tennessee and gave judgment for the state. The Tennessee Supreme Court affirmed. In reversing, the United States Supreme Court declard that a correct application of the law of interstate boundaries was necessary "in order that proper effect . . . be given to the treaties and acts of Congress by which [the Mississippi River] . . . was established as an interstate boundary, and hence this is a question of federal law." Id. at 296. It concluded that the Tennessee court had wrongly applied the boundary law.

18. Cf. United States v. Standard Oil Co., 332 U. S. 301, (1947); Clearfield Trust Co. v. United States, 318 U. S. 363 (1943); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U. S. 92 (1938). It should be noted that the Constitution provides that "the judicial Power shall extend . . . to Controversies . . . between Citizens of the same State claiming Lands under the Grants of different States . . . ." U. S. Const., Art. III, § 2. Hamilton's comments on this provision indicate more than a concern for an impartial tribunal but, in addition, a concern for an impartial law:

> The reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial, speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different states and their citizens. And it ought to have the same operation in regard to some cases between citizens of the same State. Claims to land under grants of different States, founded upon adverse pretensions of boundary, are of this description. The courts of neither of the granting States could be expected to be unbiased. The laws may have even prejudged the question, and tied the courts down to decisions in favor of the grants of the State to which they belonged.

The Federalist No. 80, at 115 (Dunne ed. 1901) (Hamilton). (Emphasis added.)

19. Even though federal law provides the rules for decision, diversity was the basis of jurisdiction in the present case. Section 1331 of the Judicial Code provides that "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws, or treaties of the United States." 28 U. S. C. § 1331(a) (1958). However, in an action to quiet title, "it is not necessary for the plaintiff to do more than allege his own title and that the defendant claims adversely to him. The nature of the ad-

(Continued on bottom of page 20)

this view of the case, the question of allowing collateral attack on the Nebraska judgment is primarily one of federal res judicata law and only secondarily one of full faith and credit. Stated differently, the federal court in Missouri should first have decided as a matter of federal common law whether it should give res judicata effect to the Nebraska judgment. Only if that issue was resolved in favor of allowing a collateral attack would the court have had to decide whether the federal statute[20] implementing the full faith and credit clause compelled it to give effect to the Nebraska judgment.[21] The court's reliance on federal res judicata law appears, therefore, to have been correct although its reasons for so doing may have been erroneous.

As a problem of res judicata, the present case involves a balancing of the policy considerations in favor of allowing the federal court in Missouri to inquire into the Nebraska court's jurisdictional determination against the almost conclusive policy underlying the finality of judg-

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verse claim, and source and manner from and in which it originated, are immaterial." Marshall v. Desert Properties Co., 103 F. 2d 551, 552 (9th Cir.), cert. denied, 308 U. S. 563 (1939). In the present case, M's claim derives not from a federal treaty, statute, or the Constitution, but merely from a Missouri swamp patent and Missouri property law. It seems unlikely, therefore, that M would have been able to establish district court jurisdiction in her "well-pleaded" complaint. On the "well-pleaded" complaint rule for establishing district court jurisdiction, see Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157, 164, 176-77 (1953).

If M and N had been citizens of the same state claiming under land grants from different states, 28 U. S. C. § 1354 (1958), implementing U. S. Const. Art. III, § 2, would have conferred jurisdiction on the district court in Missouri.

20. 28 U. S. C. § 1738 (1958).

21. Federal courts are not bound by the clause itself, but only by the statute. See Davis v. Davis, 305 U. S. 32, 39-40 (1938).

Admittedly, the analysis of the present case would be basically the same, whether the case is viewed in res judicata or full faith and credit terms. As a matter of judicial process, however, it seems preferable for a court to decide whether it would—as a matter of common law—give effect to a judgment before it decides whether a federal statute compels it to do so.

ments.[22] In striking this balance, Supreme Court decisions, as synthesized by the *Restatement of Conflict of Laws*,[23] have deemed it relevant that

> the lack of jurisdiction over the subject matter was clear; . . . the determination as to jurisdiction depended upon a question of law rather than of fact; . . . the court was one of limited and not of general jurisdiction; . . . the question of jurisdiction was not actually litigated; . . . [and] the policy against the court's acting beyond its jurisdiction is strong.[24]

The Court of Appeals decided that the present case was controlled by the last of these factors—that "the policy against the court's acting beyond its jurisdiction is strong."[25] It indicated that the Nebraska judgment would affect, although only indirectly, Missouri's sovereignty, the validity of its land titles, and its power to tax.[26] Of these interests, the latter two—the validity of Missouri's land titles and its power to tax the disputed land—are merely adjuncts of the first—sovereignty. Concededly, sovereignty over its territory is important to each state, but here neither state has clear dominion over the land in question. As the Supreme Court has said in another context, "this is . . . a case involving inconsistent assertions of power by courts of two States of the Federal Union and thus presents considerations which go beyond the interests of local policy, however vital."[27] If Missouri were to do nothing, its alleged sovereign interest could be impaired by the Nebraska judgment. However, as between the two states, the Nebraska judgment is not determinative of the boundary issue;[28] Missouri can bring

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22. See text accompanying notes 8-11 *supra*.

23. See instant case at 217-18.

24. Restatement, Conflict of Laws § 451(2) (Supp. 1948); accord, Restatement, Judgments § 10 (1942).

25. Instant case at 218-19.

26. Id. at 220.

27. Sherrer v. Sherrer, 334 U. S. 343, 354 (1948).

28. See New York v. Connecticut, 4 U. S. (Dall.) 1 (1799); Fowler v. Lindsey, 3 U. S. (Dall.) 411 (1799); cf. United States v. Lee, 106 U. S. 196 (1882).

an original action in the Supreme Court to determine in which jurisdiction the land is located.[29] Since Missouri has this constitutionally provided procedure to protect its interests, it is difficult to understand why Missouri's interest should avail *M*, who fully litigated the jurisdictional issue in the Nebraska district court, obtained a trial de novo in the Nebraska Supreme Court, and could have sought certiorari in the United States Supreme Court.[30]

The court placed considerable stress on the notion that a state's real property is traditionally immune "from direct disposition by a sister state's judgment,"[31] but failed to explore the reason for the rule. Apart from tradition,[32] this immunity is based on practical considerations which dictate that litigation concerning titles to land generally ought to be held in the jurisdiction where the land is situated: records dealing with the property will be readily available, most witnesses will be living in the same general area, the premises can be viewed easily, employees in the title office if needed to testify at the trial will not be detained for extended periods of time, and the local courts will be familiar with the recording procedure and the state's land title law. In the present case, these considerations as well as the traditional notion of a sovereign's unique "physical power" over the land balance evenly no matter in which state the trial is held

29. See U. S. Const. Art. III, § 2. It must be admitted that such an action in the Supreme Court might prove lengthy and costly. See Note, The Original Jurisdiction of the United States Supreme Court, 11 Stan. L. Rev. 665, 695 (1959). It would, however, determine the boundary not only as to the property involved in the present case but also as to property located down the river. The fact that the shifting of the river may have affected downstream property argues for one determination of the boundary issue which will be binding in all future private party suits.

30. In a petition for certiorari, *M* might have claimed that because of the Nebraska court's alleged lack of subject-matter jurisdiction, her property had been taken without due process.

31. See instant case at 219.

32. See Fall v. Eastin, 215 U. S. 1, 11-12 (1909); Developments in the Law—State-Court Jurisdiction, 73 Harv. L. Rev. 909, 943 (1960).

because it is not clear in which jurisdiction the land lies.

In addition, the present case is distinguishable from the few recent cases in which the Supreme Court has allowed collateral attack on determinations of subject matter jurisdiction. This has only occurred when an important congressional policy would have been thwarted by the earlier decision. In *Kalb v. Feuerstein*,[33] congressional policy with respect to bankruptcy was involved. The Court there stated that

> "Congress, because its power over the subject of bankruptcy is plenary, may by specific bankruptcy legislation . . . render judicial acts taken with respect to the person or property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally."[34]

In *United States v. United States Fid. & Guar. Co.*,[35] if collateral attack had not been permitted liability would have been imposed on Indian tribes that supposedly had sovereign immunity from suit. In contrast, Missouri's sovereign interest in the present case is neither directly nor conclusively impaired by the Nebraska judgment.[36]

Significantly, the Supreme Court has recently cast considerable doubt on the correctness of earlier dicta that res judicata may not apply to foreign judgments involving status or land titles.[37] Despite the old theory that the domiciliary state was an integral partner in the marriage contract, which could not be rescinded without the state's permission,[38] the Court held in *Sherrer v. Sherrer*[39] that

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33. 308 U. S. 433 (1940).

34. Id. at 438-39.

35. 309 U. S. 506 (1940).

36. See text accompanying notes 28-29, supra.

37. United States v. United States Fid. & Guar. Co., 309 U. S. 506, 514 (1940) (dictum); Stoll v. Gottlieb, 305 U. S. 165, 176 (1938) (dictum).

38. See Note, 1947-48 Term of the Supreme Court: Interstate Status of Divorce, 48 Colum. L. Rev. 1083 (1948), and authorities there cited.

39. 334 U. S. 343 (1948).

if the parties have appeared in a divorce proceeding in a sister state and if there was a determination of the bona fide residency of the spouse seeking the divorce, all states must honor that determination.[40] It thought that the policy underlying res judicata and thereby full faith and credit, outweighed the domiciliary state's interests. "There is nothing in the concept of due process which demands that a defendant be afforded a second opportunity to litigate the existence of jurisdictional facts."[41] *Sherrer* is demonstrative of the Court's tendency to extend the full faith and credit principle. Notwithstanding that a state's interest in its land may be more substantial than its interest in the marital status of its domiciliaries, the present case stands in a better posture for precluding collateral attack, for in *Sherrer* the governmental interest was foreclosed by the out-of-state litigation.

As between the litigants, there is no reason to retry the case in the Missouri federal courts. No assertion was made that the Nebraska courts rendered an unfair judgment. If *M* feared prejudice, she could have removed the action to the federal district courts.[42] The federal court in Missouri can add nothing but another independent conclusion on the question of fact which is determinative of both the jurisdictional issue and the case on its merits: did the Missouri River change its course suddenly or gradually?[43] Consequently, little is gained from the present decision. However, something of value is lost; the decision, in addition to sanctioning repeated trials of a factual issue, leads to confusion and disrespect for the

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40. However, the judgment must be given full faith and credit only if it is not subject to collateral attack in the state that rendered it.

41. Id. at 348.

42. See 28 U.S.C. §§ 1331(a), 1332(a), 1441(a) (1958).

43. See instant case at 211. On the avulsion-accretion distinction, see note 2, supra.

judicial process[44] by creating practical problems as to the binding effect of each judgment. There is some authority that if a second forum erroneously fails to give full faith and credit to a prior jurisdictional determination, the erroneous resolution of the full faith and credit issue will nonetheless be res judicata in a collateral attack on the second judgment,[45] and thus the second decision supersedes the first. But the court's conclusion in the present case that each affected state can make an independent evaluation of the jurisdictional question seems to argue against binding *N* by the Missouri judgment. Under its analysis, if the Missouri trial court should give judgment for *M*, there is no reason why a Nebraska court, in a subsequent collateral attack by *N*, should give that Missouri judgment res judicata effect; if Missouri's sovereign interest was sufficient to warrant reopening the prior jurisdictional determination, so is Nebraska's. Moreover, this analysis would authorize a third state having an interest in the land to make a third determination, which presumably would not supersede the first two. Experience dictates that the practical procedure is appellate review, not collateral attack.

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44. In a similar case; Iselin v. La Coste, 55 F. Supp. 977, 980 (W. D. La. 1944), the district court judge said in a somewhat facetious manner:

> If litigation over the same property can thus be carried on successfully in two federal courts, in different states, contiguous to the river, where the island is claimed to have been formed, it would seem that if it had happened that the location had been in, say, the Red River, adjacent to where three states, Texas, Arkansas and Louisiana, join, it would have been possible for the plaintiffs to invoke the decisions of three separate federal courts on the same chain of title
>
> . . . .

He concluded that the prior judgment was res judicata. In affirming, the Fifth Circuit continued in the same facetious vein by saying, "we are, therefore, now confronted with the vagaries of the river as well as the vagaries of counsel for Plaintiffs." Iselin v. La Coste, 147 F. 2d 791, 793 (5th Cir. 1945).

45. See Treinies v. Sunshine Mining Co., 308 U. S. 66 (1939); United States v. 171.74 Acres of Land, 206 F. Supp. 322 (D. Neb. 1962); Restatement, Judgments § 42 (1942); cf. Ambatielos v. Foundation Co., 203 Misc. 470, 116 N. Y. S. 2d 641 (Sup. Ct. 1952) (inconsistent judgments of courts of two foreign countries).

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# Supreme Court of the United States

**OCTOBER TERM, 1962**

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No. [redacted] 37

**CIVIL**

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**GENE DURFEE AND LAURA DURFEE,**
*Petitioners,*

vs.

**JULIA E. DUKE,**
*Respondent.*

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## AMICUS CURIAE BRIEF OF THE STATE OF NEBRASKA

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CLARENCE A. H. MEYER,
Attorney General,
State of Nebraska,
Lincoln, Nebraska.

Cockle Printing Company—Law Briefs—Omaha, Nebr.

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# Supreme Court of the United States

OCTOBER TERM, 1962

No. 583
CIVIL

GENE DURFEE AND LAURA DURFEE,
*Petitioners,*

vs.

JULIA E. DUKE,
*Respondent.*

## AMICUS CURIAE BRIEF OF THE STATE OF NEBRASKA

### INTEREST OF AMICUS CURIAE

The State of Nebraska through its Attorney General presents this Brief Amicus Curiae. While Nebraska is not concerned with the question of whether the petitioners or the respondent own the land involved in this controversy, she is very much interested in the question of whether the judgments of her courts are to be accorded full faith and credit in the courts of other states. It is for that reason alone that this brief is written.

The state's position is that the judgment of the Nebraska Supreme Court in *Durfee v. Keifer*, 168 Neb. 272, 95 N. W. 2d 618 (1959), is res judicata in the state and federal courts in Nebraska and that such judgment should be given full faith and credit herein.

## ARGUMENT

### Introduction

When considering the conclusive effect of a judgment of one state in the courts of a sister state, the common-law concept of res judicata and the Constitutional requirement that the judgments of a sister state shall be entitled to full faith and credit are, by their very nature, intertwined and incapable of any distinct separation. Res judicata, of course, is a common law concept favoring the finality of judgments and opposing re-litigation of the same issue between identical parties. On the other hand the requirement that each state shall accord full faith and credit to the judicial decisions of its sister states is based upon the Constitutional mandate of Article IV, Section 1 of the United States Constitution. This Court has recognized the dual relationship between res judicata and the full faith and credit clause, for it was in *Riley v. New York Trust Co.*, 315 U. S. 343, 86 L. ed. 885, 62 S. Ct. 608 (1942) that Mr. Justice Reed stated:

> "By the constitutional provision for full faith and credit, the local doctrines of res judicata, speaking generally, become a part of the national jurisprudence, and therefore federal questions cognizable here." 315 U. S. at 349, 86 L. ed. at 891.

The source of this dual relationship becomes manifest when one considers the implementing legislation to Article IV, Section 1, the full faith and credit clause. With this legislation Congress has provided, inter alia,

> "Such Acts, records and judicial proceedings or copies thereof so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." 62 Stat. 957, 28 U. S. C. A., Section 1738 (1948).

It thus becomes apparent that any attempt to separate completely for individual and isolated analysis the issues of res judicata and full faith and credit, as they appear before this Court for consideration, would be unavailing. Yet, for the sake of convenience, clarity of thought and orderly analysis, the following argument will first consider the doctrine of res judicata as it applies to subject matter jurisdiction, then the full faith and credit problems raised by the opinion of the Court of Appeals.

## Res Judicata

The petitioners herein commenced a quiet title action in the District Court for Richardson County, Nebraska, naming as defendants the present respondent and her tenants. The substantive question involved, as well as the question of the Nebraska district court's subject matter jurisdiction, revolved upon a determination of whether a shift in the channel of the Missouri River was caused by accretion or avulsion. The district Court found the shift to have been caused by avulsion, and thus determined that the court had jurisdiction and quieted title in

the petitioners. Respondent prosecuted an appeal to the Nebraska Supreme Court, and after a trial de novo that court also found for petitioners, in specific that the land was in Nebraska and the Nebraska courts had subject matter jurisdiction.

Respondent immediately commenced this second title action in the Circuit Court of Holt County, Missouri. Upon removal to the United States District Court that court concluded that the Nebraska decision was binding upon it and the petition was dismissed. The respondent then took her case to the Court of Appeals for the Eighth Circuit, whereupon that tribunal determined the concept of res judicata and the full faith and credit clause of the United States Constitution to be inapplicable. It is to review this decision that the present petition for certiorari was applied for and granted.

The question presented is whether the Nebraska Court's determination of its own jurisdiction over the subject matter, a determination made both as to fact and law after a complete hearing involving all parties, precludes a subsequent inquiry into this question by the Missouri Courts. To frame the question in a more informal manner, may the Nebraska Court lift itself by its own bootstraps and determine its own jurisdiction.

Over half a century ago the oft-quoted and much discussed case of *Forsyth v. Hammond*, 166 U. S. 506, 41 L. ed. 1095, 17 S. Ct. 665 (1897) presented to this Court a situation closely analogous to that at hand. The case originated as an Indiana State Court determination that a certain parcel of land was validly annexed by the City of Hammond. The plaintiff, owner of part of the land

and a party to the original proceeding, filed a bill in equity in federal court to restrain collection of taxes by the city on the land. An injunction was denied, but this was reversed by the Court of Appeals. Prior to the federal action, however, the plaintiff had appealed from the original state court determination to the Indiana Supreme Court. That Court had affirmed the lower state court finding of subject matter jurisdiction and dismissed the appeal.

On certiorari this Court pointed out that the plaintiff in *Forsyth*, before commencing the federal court proceeding, had voluntarily sought the judgment of the Indiana Supreme Court. The question of jurisdiction having been litigated all the way through the state courts was held to be res judicata in the federal equity proceeding.

*Forsyth* is analytically identical to the instant case. In both, the question of subject matter jurisdiction was fully litigated in the lower state court. In both, the losing party voluntarily sought review to the state's high court. In both, this voluntary submission of the issue to the state supreme court resulted in an unfavorable determination. As this court in *Forsyth* held the subsequent action to inquire into the jurisdiction of the Indiana State Court to be barred by res judicata, it should now determine this respondent's subsequent attempt to re-litigate the jurisdictional question likewise to be barred.

Another striking example of this Court's adherence to the principles of res judicata as applied to jurisdictional matters is found in *Baldwin v. Iowa State Traveling Men's Ass'n.*, 283 U. S. 522, 75 L. ed. 1244, 51 S. Ct. 517

(1931) which involved jurisdiction of the person. For the first time the Court was called upon to determine whether a prior determination of personal jurisdiction in the federal court of one state, after a hearing in which both parties were present, could be attacked collaterally in an action to enforce the original judgment in the federal court sitting in a second state. In answering this inquiry in the negative the Court stated:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matter once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in *every case where one voluntarily appears, presents his case and is fully heard*, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause." 282 U. S. 522, 525-6, 75 L. ed. 1244, 1247. (Emphasis added.)

It was but seven years later that this Court announced that the rule in *Baldwin* was applicable not only to personal jurisdiction but also to subject matter jurisdiction. This logical extension of the *Baldwin* case came in *Stoll v. Gottlieb*, 305 U. S. 165, 83 L. ed. 104, 59 S. Ct. 134 (1938).

In *Stoll* this Court held that where the question of jurisdiction of a bankruptcy court was fully litigated in that court, its determination was res judicata in a subsequent action. Mr. Justice Reed, speaking for the Court, pointed out that no opinion was being expressed as to whether the bankruptcy court did or did not have subject-matter jurisdiction, yet, inferentially the opinion seems to proceed on the assumption the bankruptcy court er-

roneously determined that it had subject matter jurisdiction.

Two years after this Court's decision in *Stoll v. Gottlieb*, supra, the question of the res judicata effect of a prior determination on the merits where the question of jurisdiction, though not raised, could have been presented, was reviewed by the Supreme Court. *Chicot Co. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 84 L. ed. 329, 60 S. Ct. 317 (1940), held that the failure to raise the jurisdictional questions in the first instance was fatal to a subsequent collateral attempt to question the court's competency over the subject matter.

In the *Chicot* case the respondent commenced an action in the federal district court in Arkansas to recover on certain bonds issued by the Drainage District. This District had been organized under the statutes of Arkansas and the bonds were in default. The petitioner pleaded as a bar to the substantive question involved a prior decree of this same district court in an action which had been instituted by the petitioner to effect a plan of readjustment of indebtedness. The district court denied the res judicata effect of the prior determination. The basis of its decision was the invalidity of the decree due to this Court's determination in *Ashton v. Cameron County Water Improv. Dist.*, 298 U.S. 513, 80 L. ed. 1309, 56 S. Ct. 892 (1936), that the statute under which the federal district court had acted was unconstitutional. The *Ashton* case was decided subsequent to the entry of the original district court decree in *Chicot*.

The general and well-settled principle that res judicata may be pleaded not only to matters actually litigated

but also to those which could have been litigated was applied to the jurisdictional findings. This Court stated:

> "Whatever the contention as to jurisdiction may be, whether it is that the boundaries of a valid statute have been transgressed, or that the statute itself is invalid, the question of jurisdiction is still one for judicial determination. If the contention is one as to validity, the question is to be considered in the light of the standing of the party who seeks to raise the question and of its particular application." 308 U. S. 371, 377, 84 L. ed. 329, 334.

The Court, citing *Stoll v. Gottlieb*, supra, then concluded:

> "There can be no doubt that if the question of the constitutionality of the statute had actually been raised and decided by the District Court in the proceeding to effect a plan of debt readjustment in accordance with the statute, that determination would have been final save as it was open to direct review upon appeal." 308 U. S. 371, 377-78, 84 L. ed. 329, 334.

The principles announced in the above discussed cases were reaffirmed in *Jackson v. Irving Trust Co.*, 311 U. S. 494, 85 L. ed. 297, 61 S. Ct. 326 (1941). Briefly, the United States moved to set aside a prior decree under the Trading with the Enemy Act contending that the court had been without jurisdiction. Affirming the decision of the lower federal courts, Mr. Chief Justice Hughes, speaking for the Court, reiterated the previous holdings in *Stoll* and *Chicot*, and found the prior decree to be res judicata as to the jurisdictional question.

A few terse yet well-grounded and erudite conclusions can be drawn from the decisions of this court involving the res judicata effect of jurisdictional findings. The

Fourteenth Amendment to the United States Constitution does not guarantee the right to litigate the same question twice, be it jurisdictional or substantive. *Chicago Life Ins. Co. v. Cherry*, 244 U. S. 25, 61 L. ed. 966, 37 S. Ct. 492 (1917); *Baldwin v. Iowa State Traveling Men's Assn.*, supra. The principles of res judicata apply in all their force and effect to questions of subject matter jurisdiction which have actually been litigated by the parties upon a full hearing of all the facts and law. *Stoll v. Gottlieb*, supra; *Chicot County Drainage Dist. v. Baxter State Bank*, supra. This rule is not varied by the fact the determination of subject matter jurisdiction in the first instance was, in fact, erroneous. *Stoll v. Gottlieb*, supra.

Any question of validity of the Nebraska decision in *Durfee v. Keiffer*, 168 Neb. 272, 95 N. W. 2d 618 (1959), or any question of a Fourteenth Amendment violation as a result of this decision could have been raised in a direct proceeding to this Court to review the Nebraska determination. Such review was not attempted and the Nebraska decision is res judicata in any subsequent proceeding between the same parties raising the identical questions which were before the Nebraska Court.

## Full Faith and Credit

At this juncture we consider the relationship between res judicata and the full faith and credit requirement. The full faith and credit mandate of Article IV, Section 1 of the United States Constitution has been in some degree expanded by Congressional implementing legislation. See 62 Stat. 947, 28 U. S. C. A. Section 1738 (1948). Controlled by this statute not only must a state court give full fatih and credit to the judgments of its sister

state, but further, this faith and credit requirement extends to federal courts. *Mills v. Duryee,* 11 U.S. (7 Cranch) 481, 3 L. ed. 411 (1813).

Both the underlying principle of the full faith and credit requirement of the Constitution and the express language of Congress require the judgment of a sister state to be given the same faith and credit which it would receive were it being reviewed in the state of its rendition. See *Christmas v. Russell,* 72 U.S. (5 Wall.) 290, 18 L. ed. 475 (1866); *Thompson v. Whitman,* 85 U.S. (18 Wall.) 457, 21 L. ed. 897 (1874). In either instance there is a clear and precise distinction between a judgment in which the jurisdiction is assumed or recited in the record, and that in which the jurisdictional questions are actually determined.

---

As the full faith and credit clause and the Congressional legislation passed in pursuance thereof prescribe the effect of a sister state judgment to be the same "by law or usage" as it would have been in the rendering state, a brief review of Nebraska law in this respect is in order. Our court has announced that a judgment of a court which did not have jurisdiction of the subject matter or the person, and that question was not litigated, is not res judicata. *Zenker v. Zenker,* 161 Neb. 200, 72 N. W. 2d 809 (1955). *Zenker* involved an attempt to register a Colorado divorce decree in Nebraska. Recognition was refused when it was shown that personal service over the defendant-husband had been obtained by fraud, that the plaintiff-wife had never been a Colorado domiciliary and that the judgment was by default.

Nonetheless, the Nebraska court has recognized that a determination of jurisdiction which has actually been litigated is not open to collateral attack. In *Gergen v. Western Union Life Ins. Co.*, 149 Neb. 203, 30 N. W. 2d 558 (1948), our court stated:

> "This court adheres to the rule that if a court is one competent to decide whether or not the facts in any given proceeding confer jurisdiction, decides that it has jurisdiction, then its judgments entered within the scope of the subject matter over which its authority extends in proceedings following the lawful allegation of circumstances requiring the exercise of its jurisdiction, are not subject to collateral attack but conclusive against all the world unless reversed on appeal or avoided for error or fraud in a direct proceeding." 30 N. W. 2d at 562.

It is thus apparent that had respondent herein commenced her second action in Nebraska, say, for example, in the Federal District Court, she would have been concluded from contesting either the jurisdiction or substantive holdings of the Nebraska Supreme Court.

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There remains the full faith and credit problem raised by the opinion of the Court of Appeals. That court, relying on *Thompson v. Whitman*, supra, and similar cases denied full faith and credit to the Nebraska decision. Let us then examine *Thompson* and probe briefly other decisions of this Court involving the combination of res judicata, full faith and credit and jurisdictional determinations.

*Thompson v. Whitman*, supra, originated as a trespass action based upon an asserted unlawful seizure of the plaintiff's sloop. The defendant attempted to justify

the seizure on the ground the sloop was unlawfully gathering clams within the jurisdiction of Monmouth County, New Jersey. The plaintiff challenged the place of seizure as being within New Jersey waters, thereby challenging the authority of the defendant to make the seizure. Defendant pleaded as res judicata a New Jersey judgment which recited the offense as having been committed in Monmouth County.

On review, this Court decided that the full faith and credit clause did not prevent a subsequent inquiry into jurisdiction. This collateral attack, however, was allowed in a situation where the prior finding of jurisdiction was supported only by an allegation in the records of the initial proceeding. There had been no actual litigated determination of jurisdiction or finding as to where the sloop had been seized.

In *American Surety Co. v. Baldwin*, 287 U.S. 156, 77 L. ed. 231, 53 S. Ct. 98 (1932), the surety company sought to be relieved of two judgments by an Idaho Court on a supersedeas bond. By executing the bond the company became a party to the litigation under the laws of Idaho. There was a judgment entered on the bond pursuant to a consent to judgment contained therein. In the collateral proceeding the surety company contended that a proper construction of the bond indicated that as to one of the judgment debtors, it had not consented to judgment without notice, and thus the Idaho Court was without jurisdiction to enter such an order. This Court refused to uphold these allegations, pointing out that after entry of the consent judgment the surety company moved the Idaho District Court to vacate and set aside its order.

The ruling on this motion was appealed to the Supreme Court of Idaho where it was determined that the jurisdiction of the Idaho District Court had been decided in the original proceeding; that the surety company was a party to that proceeding; that no appeal was taken to the Idaho Supreme Court from that determination; and thus the surety company was precluded by res judicata from raising a jurisdictional question by its motion to vacate.

Mr. Justice Brandeis, after pointing out that the jurisdictional question was actually adjudicated and not merely assumed, concluded:

> "The principles of res judicata apply to question of jurisdiction as well as to other issues. Baldwin v. Iowa State Traveling Men's Assn., 283 U. S. 522, 75 L. ed. 1244, 51 S. Ct. 517. They are given effect even where the proceeding in the federal court is to enjoin the enforcement of a state judgment, if the issue was made and open to litigation in the original action, or was determined in an independent proceeding in the state courts. * * * Since the decision would formally constitute res judicata in the courts of the state; since it in fact satisfied the requirements of prior adjudication; and since the constitutional issue as to jurisdiction might have been presented to the state Supreme Court and reviewed here, the decision is a bar to the present suit insofar as it seeks to enjoin the enforcement of the judgment for want of jurisdiction: 287 U. S. at 166-67, 77 L. ed. at 238."

The criteria set forth by Mr. Justice Brandeis in Baldwin likewise appear herein. The following factors were considered determinative: (1) The decision of the Idaho state courts on the issue of jurisdiction constituted res judicata within that state; (2) the requirement of

prior adjudication was satisfied; and (3) any constitutional issue as to jurisdiction might have been carried through the state courts and presented for review in the United States Supreme Court. The identical criteria are presented in this case. Presumably the Nebraska decision in *Durfee v. Keiffer*, supra, is res judicata in Nebraska courts; the question of subject matter jurisdiction has actually been litigated by the parties; and finally, any constitutional issues as to jurisdiction could have been raised by the respondent upon review to this court.

A similar decision was reached in *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 61 L. ed. 966, 37 S. Ct. 492 (1917), involving an Illinois action upon a prior Tennessee judgment. The defendants claimed the Tennessee court had not obtained personal jurisdiction. The Illinois court refused to inquire into the jurisdiction of the Tennessee courts as this issue had been adjudicated after a full hearing in the first instance. Though the question of full faith and credit was not raised since the Illinois courts refused to inquire into jurisdiction, this Court recognized that there was no constitutional prohibitions preventing the recognition of an actually litigated jurisdictional question.

In *Williams v. North Carolina*, 325 U.S. 226, 89 L. ed. 1577, 65 S. Ct. 1092 (1945) this Court held that a state, having a sincere and recognized interest in her domicilaries, is not bound by a jurisdictional determination of domicile in a foreign court in an action to which the state itself was not a party. This decision is inapplicable here for Nebraska is contending neither that *Durfee v. Keiffer*, supra, binds her or Missouri on the question of

state boundaries, nor does she claim to have any inherent interest in controlling the ownership of the land in dispute. Nebraska's interest is in seeing that the final judgments of this State are accorded the faith and credit required by Article IV, Section 1 of the United States Constitution.

Applicable here is *Sherrer v. Sherrer*, 334 U.S. 343, 92 L. ed. 1429, 68 S. Ct. 1087 (1948), a divorce case which holds a jurisdictional fact determination of Florida to be conclusive on the parties in a subsequent Massachusetts suit.

## CONCLUSION

The principles of res judicata apply with equal force and effect to jurisdictional questions, be they personal or subject matter, as they do to substantive issues previously resolved between the parties. Respondent litigated the question of jurisdiction in the trial court, and after an unfavorable decision voluntarily submitted her case to the Nebraska Supreme Court. Pursuant to Nebraska rules a trial de novo was conducted and again the respondent was unsuccessful. Rather than further prosecute her jurisdictional claim by seeking review in this Court, a second action was commenced in Missouri involving the same parties, the same subject matter and the same issues. Upon examination of the many cases decided by this Court and the principles enunciated therein, it is submitted that the United States District Court was entirely correct in its determination that the Nebraska decision was res judicata.

It is further submitted that this res judicata effect was denied the full faith and credit to which it was entitled in the Court of Appeals. This Court accords the same faith and credit to jurisdictional determinations as it does to questions on the merits. There are no impelling policy reasons necessitating a deviation from the constitutional principles of the full faith and credit clause.

The State of Nebraska as *amicus curiae* respectfully submits that the decision of the Court of Appeals is erroneous, and prays that this Court reinstate the decision of the United States District Court below by remanding this cause with instructions to affirm.

Respectfully submitted,

CLARENCE A. H. MEYER,
Attorney General,
State of Nebraska,
Lincoln, Nebraska.

## PROOF OF SERVICE

I, Clarence A. H. Meyer, Attorney General of the State of Nebraska and a member of the Bar of the Supreme Court of the United States, hereby certify that on August 22, 1963, I served copies of the foregoing Amicus Curiae Brief of the State of Nebraska upon respondent by depositing the same in a United States mailbox with first class postage prepaid, addressed to Robert A. Brown, Tootle-Enright Bank Building, St. Joseph 2, Missouri, such being the post office address of said counsel of record for respondent.

CLARENCE A. H. MEYER,
Attorney General,
State of Nebraska,
Lincoln, Nebraska.

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. [redacted] 37
CIVIL.

GENE DURFEE AND LAURA DURFEE,
*Petitioners,*

vs.

JULIA E. DUKE,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## BRIEF OF RESPONDENT.

R. A. BROWN,
212 1/2 North Sixth Street,
St. Joseph, Missouri,
JOHN H. WILLIS,
Falls City, Nebraska,
*Attorneys for Respondent.*

R. L. Stinnett, Inc., 1309 Oak Street, Kansas City 6, Mo., HAncock 1-2929

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

## No. 593.

CIVIL.

GENE DURFEE AND LAURA DURFEE,
*Petitioners,*

vs.

JULIA E. DUKE,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## BRIEF OF RESPONDENT.

### ADDITIONAL STATEMENT OF THE CASE.

Prior to 1855 the main channel of the Missouri River flowed to the north and east of the location of the land now in controversy (R. 32). The survey of 1855-1856 shows the main channel had moved west and south but was still east and north of the land in question (R. 32).

Long prior to the early 1900's this land had ceased to exist. There is no consecutive record of ownership either in Nebraska or Missouri, and no Nebraska or Missouri abstracts to show a continuous chain of title.

In 1916 Respondent's father first acquired land of which the land in question is now a part (R. 37). In the early 20's there was land south and west of Respondent's father's land (R. 37). The alleged Nebraska owners did not exercise any supervision or occupancy of the land from the late 30's or early 40's. This litigation was instituted in 1959 (R. 40). On the other hand, Respondent was in unquestioned possession of the land from 1943 until the present time (R. 40). In 1943 Respondent used a portion of the land and cleared a portion of it (R. 38). In 1946 she secured a swamp land deed from Holt County, Missouri. From year to year thereafter Respondent continued to put forth efforts to bring portions of the land under cultivation (R. 38). A cottonwood tree was cut from this land in 1959 and the tree was aged by a state forester of Missouri. It was the largest tree on the land and its age was thirty-five years (R. 37).

The petitioners obtained a sheriff's deed to this property from Richardson County, Nebraska in 1956, as a result of a tax foreclosure sale (R. 32). Petitioners never have been in possession or occupancy of the land.

## SUMMARY OF ARGUMENT.

### I.

Where the question of title to real estate is litigated in the Courts of one state the jurisdiction of the Court trying the case may be collaterally attacked in the Courts of another State, and the Courts of the second State are not bound by the finding of the Courts of the first state as to jurisdiction of the subject matter.

### A.

The Courts of the second State are not foreclosed by the full faith and credit clause of the Federal Constitution from questioning the jurisdiction of the Courts of the first State.

*Adam* v. *Saenger*, 1938, 303 U.S. 59, 82 L. ed. 649, 58 S. Ct. 454.

*Chicago L. Ins. Co.* v. *Cherry*, 1917, 244 U.S. 25, 61 L ed. 966, 27 S. Ct. 492.

*Davis* v. *Davis*, 1938, 305 U.S. 32, 83 L. ed. 26, 59 S. Ct. 3.

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*Sherrer* v. *Sherrer*, 1948, 334 U.S. 343, 92 L. ed. 1429, 68 S. Ct. 1087.

*Thompson* v. *Whitman*, 1874, 85 U.S. (18 Wall.) 457, 21 L. ed. 897.

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81 C.J.S. 903.
50 C.J.S. 38, 502.
30 A Am. Jur. 176, 197.
2 A.L.R. 2d 1188.
Restatement, Judgments, Par. 5 (i), (k), Par. 4 (b), Par. 71 (b).
Restatement, Conflicts, Par. 48.

B.

The Courts of the Second State are not bound by the doctrine of *res judicata* and may collaterally question the jurisdiction of the courts of the first State of the subject matter.

*Baldwin* v. *Iowa State Traveling Men's Assoc.*, 1931, 283 U.S. 522, 75 L. ed. 1244, 51 S. Ct. 517.

*Carpenter* v. *Strange*, 141 U.S. 47; 35 L. ed. 649, 11 S. Ct. 851.

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*Huntington* v. *Attrill*, 1892, 146 U.S. 657, 26 L. ed. 1123, 13 S. Ct. 224.

*Jackson* v. *Irving Trust Co.*, 1941, 311 U.S. 494, 85 L. ed. 297, 61 S. Ct. 326.

*Milliken* v. *Meyer*, 1940, 311 U.S. 457, 85 L. ed. 278, 61 S. Ct. 339.

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*Olmstead* v. *Olmstead*, 216 U.S. 386, 54 L. ed. 530, 30 S. Ct. 292.

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Restatement, Conflicts, Par. 10, Par. 451.

Restatement, Conflicts (1948 Supp.), Par. 451 (2).

## ARGUMENT.

### (A) Full Faith and Credit.

It is the position of the Respondent that in a situation where the question of jurisdiction of the subject matter has been litigated in the Courts of one State and the subject matter is realty, the full faith and credit clause does not prevent the Courts of the sister State from collaterally attacking this matter and again questioning the jurisdiction of the Courts of the first State. Petitioners, in their brief have considered this question under points six and

seven and have discussed some nine cases. The first of these is *Chicago Life Insurance Company* v. *Cherry*, 1917, 244 U.S. 25, 61 L. ed. 966, 37 S. Ct. 492. That case was considered by Judge Blackmun, in his opinion, in the Eighth Circuit and has nothing whatsoever to do with full faith and credit. This case concerns solely the jurisdiction of the person. That jurisdiction was litigated in the first instance and was held to be *res judicata* at a later date. It had nothing whatsoever to do with jurisdiction of real property. Judge Blackmun very amply pointed this out (R. 57) and the quotation from this case in petitioners' brief at page 43 shows conclusively that it did not involve full faith and credit.

Petitioners' next case is *Davis* v. *Davis*, 1938, 305 U.S. 32, 83 L. ed. 26, 59 S. Ct. 3. This case was carefully considered in the Blackmun opinion and placed in its proper setting (R. 62). This was a divorce case and involved jurisdiction of the person, announced a rule which is adhered to in divorce cases, but which has nothing to do with the question under consideration. The next case is *Williams* v. *North Carolina*, 1945, 325 U.S. 226, 89 L. ed. 1577, 65 S. Ct. 1092. This case very clearly supports the position of the Respondent. In it, it was said

> "*Thompson* v. *Whitman* made it clear that the doctrine of *Mills* v. *Duryee* comes into operatiaon only when, in the language of Kent, 'the jurisdiction of the court in another State is not impeached; either as to the subject matter or the person'. Only then is 'the record of the judgment * * * entitled to full faith and credit'."

It is further stated:

> "A judgment in one State is conclusive upon the merits in every other State, but only if the court of the

first State had power to pass on the merits—had jurisdiction, that is, to render the judgment."

The first head note states:

"The full faith and credit clause operates only with respect to judgments rendered by a court whose jurisdiction, either as to the subject matter or person, is not impeached."

Judge Blackmun considered this case and found it had no controlling effect.

*Sherrer* v. *Sherrer*, 1948, 334 U.S. 343, 92 L. ed. 1429, 68 S. Ct. 1087, is the next case. This case is simply another divorce case following the rule announced in *Davis* v. *Davis*, but it is interesting to note that Judge Frankfurter dissented arguing that collateral attack was proper.

One of the basic cases supporting Respondent's view is *Thompson* v. *Whitman*, 1874, 85 U.S. (18 Wall.) 457, 21 L. ed. 897. According to Judge Blackmun this case comprehensibly restated the principle for which the Respondent is contending (R. 57). In that opinion it was said:

"As to a foreign judgment it is perfectly well settled that the inquiry is always open, whether the court by which it was rendered had jurisdiction of the person or of the thing. 'Upon principle' says Chief Justice Marshall, 'it would seem that the operation of every judgment must depend upon the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject matter which it has determined. * * *' "

Petitioners' interpretation of this case quite obviously is entirely erroneous. They argue that where jurisdiction was litigated, in the first case, it cannot be litigated in the second case, but the opinion does not say that. This is the same erroneous interpretation of other cases reached by

Judge Duncan in his memorandum opinion. The Thompson case sets down a hard and fast rule without a clarification which completely supports the position of Respondent.

Another strong opinion favoring the Respondent appears in *Grover & Baker Sewing Machine Co.* v. *Radcliffe*, 1890, 137 U.S. 287, 34 L. ed. 670, 11 S. Ct. 92. This case was commented upon by Judge Blackmun wherein he said the principle sought by Respondent was comprehensibly stated in this case (R. 57) and wherein the judge further said that the opinion revealed particular fervor with respect to extra territorial *in rem* judgments of State courts (R. 7). In that opinion the court quoted Mr. Justice Story in his Commentaries as follows:

> "No sovereignty can extend its process beyond its own territorial limits, to subject other persons or right of property to its judicial decisions. Every exertion of authority beyond these limits is a mere nullity, and incapable of binding such persons or property in other tribunals; * * * Such is the familiar, reasonable and just principle of the law of nations; and it is scarce supposable that the framers of the Constitution designed to abrogate it between States which were to remain as independent of each other for all but national purposes, as they were before the Revolution."

Petitioners say this case has nothing to do with the present issue but they base that conclusion on the faulty premise that jurisdiction had not been litigated in the first instance and therefore could be litigated in the second case. It has already been pointed out that this is not correct.

In *Adam* v. *Saenger*, 1938, 303 U.S. 59, 82 L. ed. 649, 58 S. Ct. 454, the court said:

> "In a suit upon the judgment of another State the jurisdiction of the court which rendered it is open to judicial inquiry".

And the court further said:

> "When the matter of fact or law upon which jurisdiction depends was not litigated in the original suit, it is a matter to be adjudicated in the suit founded upon the judgment."

According to Judge Blackmun this decision is one of the basic decisions and fully supports Respondent's position. This, however, is a case upon which Judge Duncan went astray and which has caused petitioners to adopt an erroneous viewpoint. The opinion simply says that jurisdiction in a situation of this kind is always open to collateral attack. It further says that if jurisdiction was not questioned in the first case, it must be questioned in the second. Petitioners seek to add a third interpretation which is that if jurisdiction was questioned in the first case, it cannot be questioned in the second. It will be noted that nowhere in the opinion is there language to support this.

*Milliken* v. *Meyer*, 1940, 311 U.S. 457, 85 L. ed. 278, 61 S. Ct. 339, is another basic decision and one relied upon by Judge Blackmun (R. 57). In this case it was said:

> "Where a judgment rendered in one State is challenged in another, a want of jurisdiction over either the person or the subject matter, is, of course, open to inquiry."

Certainly this is the very clear and definite statement of the rule for which Respondent is contending. Petitioners, however, seek to distinguish this case by again saying that jurisdiction was not questioned in the first instance and therefore, cannot be questioned at this time. The

opinion simply does not say that and such an argument cannot be read into it.

That this court still adheres to this rule is clearly demonstrated in the case of *Western Union Telegraph Company* v. *Pennsylvania*, 1961, 368 U.S. 71, 7 L. ed. 2d 139, 82 S. Ct. 199. This opinion was relied upon by Judge Blackmun and in the opinion the court said:

> "A state court's judgment need not be given full faith and credit by other states as to parties or property not subject to the jurisdiction of the Court that rendered it."

In our opinion petitioners' discussion of this case reaches an untenable position which is directly contrary to the rule of law stated in the opinion.

The question under discussion has been considered in a number of textbooks and encyclopedias. There are many quotations which are of value. In 81 C.J.S. 903, it is said:

> "Records and proceedings of courts of other States are entitled to full faith and credit only insofar as such courts have jurisdiction of the subject matter and the parties. And the facts necessary to give jurisdiction to the court rendering the decree may be inquired into. * * * A State not a party to the exertion of judicial authority in another State but seriously affected by it, may in the exercise of its own power determine the truth of the record recital of the essential fact of domicile."

In the Restatement of the Law, Judgments, paragraph 5 (i), it is said:

> "As a personal judgment rendered against the defendant over whom the State has no jurisdiction is void, so a judgment purporting to affect interests in things is void if the things are beyond the jurisdiction

of the State. This is true not only where the judgment is a judgment in rem, purporting to bind the interests of all persons in the thing, but also where it is a judgment quasi in rem, purporting to bind the interests of designated persons."

In the same section, at sub-paragraph (k) it is said:

"The courts normally cannot exercise jurisdiction over a sovereign, domestic or foreign, or over its property, without its consent."

Paragraph 4 (b), says:

"If a judgment in rem or quasi in rem is rendered by a court of a State and the State does not have jurisdiction to subject to its control the thing which is the subject of the action, the judgment is void."

and paragraph 5 makes the same statement, with no limitation whatsoever.

Under paragraph 71 (b), of the same volume appears this statement:

"The courts of one State cannot directly determine the question of title to land in another State, nor can they do so incidentally in the doctrine of collateral estoppel."

This is directly in line with a statement found in the Restatement of the Law, Conflict of Laws, where it is said at paragraph 48:

"An immovable thing is subject to the jurisdiction of the State in which it is."

Under the comment to this section appears the statement:

"Since the immovable is of such a character that it cannot come within the power of any other state without a change in the territory of both States."

Both C.J.S. and Am. Jur. contain other statements which are of value and enlightening. For instance in 50 C.J.S., at page 38, it is said:

> "A void judgment, such as one rendered by a court not having jurisdiction of the parties or the subject matter, does not merge the cause of action or operate as a bar to further litigation."

And at page 502 of the same volume, it is said:

> "A party sought to be bound or affected by the judgment of a court of a sister State may impeach its validity and escape its effect by showing that the court rendering it had no jurisdiction over the parties or over the subject matter."

It is said in 30A Am. Jur., at page 176:

> "It is essential to the proper rendition of a judgment that the court have jurisdiction of the subject matter. A judgment rendered without jurisdiction of the subject matter is void. The operation of this rule is not affected by the judicial discretion of the court."

And at page 197 it is stated:

> "A void judgment is not entitled to the respect accorded a valid adjudication, but may be entirely disregarded or declared inoperative by any tribunal in which effect is sought to be given to it. • • •. It may be attacked by a person adversely affected by it in any proceeding, direct or collateral, and at any time. • • • In other words, a void judgment is regarded as a nullity, and the situation is the same as it would be if there were no judgment."

A somewhat similar pronouncement appears in 2 A.L.R. 2d, at page 1188, wherein it is said:

> "It is a fundamental rule of international jurisprudence that every State or nation possesses an ex-

clusive sovereignty and jurisdiction within its own territory. The consequence of this maxim is that no State can by its laws, and no court can by its judgments or decrees, directly bind or affect property or persons beyond the limits of that State."

It seems apparent from the above discussion that the full faith and credit clause of the Federal Constitution clearly does not apply to the situation which is now presented to this Court and that the Respondent was not precluded by such clause from collaterally attacking in the Missouri courts the Nebraska judgment.

**(B) Res Judicata.**

As Judge Blackmun very aptly pointed out in his opinion, matters of personal jurisdiction and matters of subject matter jurisdiction have not received identical treatment from the Court (R. 57). There are a number of cases where the Court had jurisdiction of the person and it was held that the judgment could not be collaterally attacked later in another court. To such effect is *Chicago Life Insurance Co.* v. *Cherry*, 1917, 244 U.S. 25, 61 L. ed. 966, 37 S. Ct. 492 and *Baldwin* v. *Iowa State Traveling Men's Association*, 1931, 283 U.S. 522, 75 L. ed. 1244, 51 S. Ct. 517. These two opinions which are cited by petitioners as supporting their view simply announce the doctrine regarding jurisdiction of the person and say nothing whatsoever about jurisdiction of subject matter. They in no way apply to a case involving subject matter jurisdiction where the subject matter is real property.

The case of *Forsyth* v. *Hammond*, 1897, 166 U.S. 506, 41 L. ed. 1095, 17 S. Ct. 665, at first glance presents some question but on closer study can easily be differentiated. All the litigation in that case involved litigation in the courts of one state. The case did not involve the jurisdic-

tion of the court of another State. The court specifically emphasized what it called "another aspect of this case", namely that the controversy was one peculiarly within the domain of State control. The court said that Federal jurisdiction rested on adverse citizenship and not on any Federal constitutional right (R. 59-60).

Petitioners next rely on *Stoll* v. *Gottlieb*, 1938, 305 U.S. 165, 83 L. ed. 104, 59 S. Ct. 134. This was a bankruptcy case and had nothing whatsoever to do with the jurisdiction of real property. It did not overrule an earlier and contrary result in the case of *Vallely* v. *Northern Fire & Marine Insurance Co.*, 1920, 254 U.S. 348, 65 L. ed. 297, 41 S. Ct. 116, and arrived at its result on a ground not relied upon in the Vallely case. The interesting thing about this case, however, and a point which is entirely overlooked by petitioners, is the additional statement made by the court in that case at page 176 of 305 U.S. wherein the court stated:

> "To appraise the cases dealing with status and transfer of title to real estate seems outside the scope of the present inquiry. The rule applied here may or may not be applicable in instances where the courts with jurisdiction of the later controversy are passing upon matters of status and real estate titles."

It is thus quite apparent that in the mind of this court itself this case has nothing to do with jurisdiction involving real property.

Petitioners next assert that the case of *Treinies* v. *Sunshine Mining Co.*, 1939, 308 U.S. 66, 84 L. ed. 85, 60 S. Ct. 44, supports their position. This is a rather interesting case and contains unexplainable inconsistencies. This was pointed out by Judge Blackmun in his opinion (R. 63-64). The significant facts in this case are that an Idaho

Court questioned a judgment of a Washington court and held that the Washington court did not have jurisdiction; in a latter proceeding it was held that the Idaho court was well within its rights to examine into the jurisdiction of the Washington court and this court, in its opinion, said:

> "The power of the Idaho court to examine into the jurisdiction of the Washington court is beyond question."

*Jackson* v. *Irving Trust Co.*, 1941, 311 U.S. 494, 85 L. ed. 297, 61 S. Ct. 326, is petitioners' next authority. This case was thoroughly discussed by Judge Blackmun (R. 65). It had nothing to do whatsoever with title to real property, it had nothing to do with subject matter jurisdiction of an object claimed by different States and all proceedings were in the court of one state. The opinion caused Judge Blackmun no concern and we feel it requires no further comment.

Next we come to the case of *Chicot Co. Drainage District* v. *Baxter State Bank*, 1940, 308 U.S. 371, 84 L. ed. 329, 60 S. Ct. 317. Judge Blackmun considered this case and his comment was it did not involve real estate (R. 64). That this opinion of Judge Blackmun's announced a very logical conclusion is brought out by the opinion from this court in *United States* v. *United States Fidelity & Guaranty Co.*, 1940, 309 U.S. 506, 84 L. ed. 894, 60 S. Ct. 653, where this court said in speaking of the Chicot County case:

> "In the Chicot County case no inflexible rule as to collateral objection in general to judgments was declared. We explicitly limited our examination * * *. No examination was made of susceptibility to such objection of numerous groups of judgments concerning status, extraterritorial action of courts, or strictly jurisdictional and quasi-jurisdictional facts."

It is thus apparent that the Chicot opinion was not intended to apply to questions involving real property or

strictly jurisdictional and quasi-jurisdictional matters. Judge Blackmun's interpretation of this case was quite correct.

This court approved collateral attack in *Vallely* v. *Northern Fire & Marine Insurance Co.*, 1920, 254 U.S. 348, 65 L. ed. 297, 41 S. Ct. 116. This was a bankruptcy court case wherein an insurance company had been declared bankrupt under an involuntary petition despite the fact that the bankruptcy act expressly excepted insurance companies. No appeal was taken. The company later moved to vacate the judgment for lack of jurisdiction. The motion was sustained and was approved by this court. This case presents a situation where policy was emphasized (R. 60). This court in that case was called upon to comment upon the argument in the first place that any litigated issue should be open only to direct attack and the argument in the second place that courts may not act beyond the power and authority conferred upon them. The court said, page 354 of 254 U.S.:

> "Which of the propositions shall prevail in a given case cannot be dogmatically asserted, and cases of their consideration and application can be cited against each other."

In 1930 and ten years after the decision in the preceding case this court handed down an opinion in *Grubb* v. *Public Utilities Commission*, 1930, 281 U.S. 470, 74 L. ed. 972, 50 S. Ct. 374. In this case a State Public Service Commission had denied an applicant an operating certificate for a bus route. On his appeal the Supreme Court of the State affirmed it. The applicant then pursued an injunction suit in Federal Court. The commission pleaded the same judgment as a bar. This court, in holding that the prior judgment was not a bar said:

> "That the state court had jurisdiction of the parties is plain and not questioned. But the appellant does question that it had jurisdiction of the subject matter —and this although at the outset he treated that jurisdiction as subsisting and invoked its exercise. Of course, he is entitled to raise this question notwithstanding his prior inconsistent attitude, for jurisdiction of the subject matter must arise by law and not by mere consent."

Petitioners seek to laugh this case away by saying it involved an application of the rule that jurisdiction of the subject matter may not be conferred by consent. The opinion does not substantiate that. The opinion says in so many words that the petitioner was entitled to question jurisdiction whether he consented or not, for jurisdiction of the subject matter must arise by law and not by mere consent.

This case was discussed and relied upon by Judge Blackmun (R. 60-61).

In 1940 appeared the opinion in the case of *United States* v. *United States Fidelity & Guaranty Co.*, 1940, 309 U.S. 506, 84 L. ed. 894, 60 S. Ct. 653. This case has been analyzed in the Blackmun opinion (R. 64-65) and has been discussed by petitioners in their brief. The opinion allowed collateral attack on the question of jurisdiction. It emphasized heavily the question of policy.

One of the most enlightening cases is *United States* v. *171.74 Acres of Land*, 266 F. Supp. 322, l.c. 324. Litigation here started when a petition was filed to register a judgment of the District Court of Iowa. This judgment involved title to land. A Nebraska court directly passed on the Iowa court's question of jurisdiction and said the Iowa judgment was void because Iowa had no jurisdiction over the land since it was in Nebraska. It further said:

"Therefore, the Iowa judgment was not entitled to full faith and credit or to registration as a foreign judgment."

This judgment was affirmed by the Nebraska Supreme Court. An attack was then made on the judgment in the Federal District Court of Nebraska and that court said:

"This evidence is clearly an attempt to relitigate the exact issues determined by the Courts of Nebraska. Whether this may properly be done is the key issue for the court to decide." (l.c. 324).

The opinion is too long to quote in detail but it contains many pertinent statements and points out that there could be no further litigation in Nebraska because Nebraska had already litigated the matter. On the other hand, the opinion agreed that Nebraska examined the jurisdiction of the Iowa Court, found Iowa did not have jurisdiction of the subject matter and then refused full faith and credit to the Iowa judgment.

There is in this opinion an additional statement which, when it is once understood, and that is somewhat difficult, answers another argument advanced by petitioners. The court said at l.c. 325:

"Where a court of one state denies effect of a judgment of another State on the ground of absence of jurisdiction, although there had been a finding of the presence of such jurisdiction in a contested proceeding in the latter State, and the former judgment is not reversed on appeal, it has been held that the latter judgment of the former will be given effect as *res judicata*."

The court also said in quoting from Section 10 (e) of the Restatement of Judgment:

"Thus, if in the first action the court determines that it has jurisdiction over the subject matter, but in

a second action between the parties the court determines that the court in the first action had no jurisdiction over the subject matter, then in a third action between the parties the court is bound by the determination in the second action."

When these quotations are once understood it appears clearly that the court has said where a matter has been litigated in one State and then is litigated in a second State because of the alleged lack of jurisdiction of the first State of the subject matter, and the second State determines that the first State did not have such jurisdiction, then if a third action is brought between the parties the court is bound by the determination in the second action.

Many of the cases cited under Point A, *supra*, apply to the question of *Res Judicata*. Among them *Thompson* v. *Whitman*, *Milliken* v. *Meyer* and *Grover & Baker Sewing Machine Co.* v. *Radcliffe*. All of them indicate that *Res Judicata* does not apply in the situation which we are discussing.

All the quotations from textbooks, encyclopedias and other works which were set out under Point A, *supra*, with the exception of the quotation from 81 C.J.S. 903, apply equally to this question of *Res Judicata*. A further quotation to the same effect appears in 30 A Am. Jur., at page 398, wherein it is said:

"In order that a judgment may operate as a conclusive determination of a cause of action, or of facts litigated therein, it is necessary that it should have been rendered by a court of competent jurisdiction of the parties and of the subject matter. A judgment which is void because rendered without jurisdiction is not *res adjudicata*."

The complexity of the questions involved here is well demonstrated in the treatment these questions have re-

ceived in the Restatement of the Law. In 1943, in the Restatement of the Law, Judgments, at paragraph 10 appeared this statement:

> "Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction. Among the factors appropriate to be considered in determining that collateral attack should be permitted are that
>
> (a) The lack of jurisdiction over the subject matter was clear;
>
> (b) The determination as to jurisdiction depended upon a question of law rather than of fact;
>
> (c) The court was one of limited and not of general jurisdiction;
>
> (d) The question of jurisdiction was not actually litigated;
>
> (e) The policy against the court's acting beyond its jurisdiction is strong."

In the same year in the Restatement of the Law, Conflict of Laws, at paragraph 451, appeared this statement:

> "The party appearing and participating in proceedings in a court of any State will be precluded from questioning the jurisdiction of the court over his person in any subsequent proceeding in that State or in any other State if the court in which he appeared purported to render a judgment against him."

There was appended to this, however, the following caveat:

"The institute expresses no opinion whether and how far a party appearing and participating in the proceedings in a court of any State is precluded from subsequently questioning the jurisdiction of the court over the subject matter of the action in the courts of that State or any other State if the court in which he appeared purported to render a judgment against him."

There was at that time some question in the minds of the institute concerning this proposition. By 1948, however, the situation had cleared. In the 1948 supplement, Restatement of the Law, Conflict of Laws, paragraph 451, sub-paragraph 2, the caveat has disappeared and the section is identical with Section 10 of the Restatement of Judgments.

Now let us analyze this statement. It simply says that if a court has decided a matter and has determined that it had jurisdiction of the subject matter, its judgment cannot be collaterally attacked on the grounds of jurisdiction unless the policy underlying the doctrine of *res judicata* is outweighed by the policy against permitting the court to act beyond this jurisdiction. Among other factors five specific factors are set out which are appropriate to be considered in determining that collateral attacks should be permitted. The statement thus is not that there are only five exceptions, but that five among others are listed in the Restatement. Further, each exception stands on its own feet. If any exception exists, that is sufficient grounds for allowing collateral attacks. Now let us look at the factors.

It can be conceded that factors (b), (c) and (d) are not under consideration. Factor (e) was discussed by Judge Blackmun. Factor (a) was not. It is Respondent's position that both of these factors are in this case.

According to the Restatement, collateral attack is allowed if the lack of jurisdiction over the subject matter was clear. Petitioners' discussion of this question ridicules the proposition and says it is an understatement to say that the court's lack of jurisdiction is not particularly clear. We suggest that the record indicates otherwise. Judge Duncan handed down a lengthy opinion discussing the factual elements of this litigation. His opinion indicates he made an exhaustive study of all the evidence. In his opinion he said "To me, the evidence clearly reveals that prior to the cut-through and the formation of the chute, the main channel was to the south and west of the land in controversy." (R. 38). He again said "I am convinced that the evidence clearly shows that prior to the formation of the island in controversy, the main channel of the river was to the south and west thereof." (R. 39).

He again said "It is my definite conclusion that under all the evidence in this case the land was located in Missouri at the time plaintiff acquired her deed under the swamp-land title act," (R. 40), and he finally said "It is my belief that the evidence clearly reveals that the land lies in Missouri." (R. 42). It thus appears that to Judge Duncan the record was clear and convincing that the location of this land was fixed and that it was Missouri land and if it was Missouri land it belonged to the Respondent Duke. In other words the lack of jurisdiction over the subject matter was entirely clear to Judge Duncan.

We have been reaching factor (e), the policy factor, for some time and we have previously pointed out that frequently a question of policy is important.

We can perhaps do no better than to paraphrase in a sense what Judge Blackmun had to say along these lines (R. 69). This case involves the traditional policy of im-

munity of the State's real property from direct disposition by a sister State judgment. This court, by its previous opinions, has suggested the existence of a real estate policy of this kind. Most of the Supreme Court cases which have refused to follow the principle of *res adjudicata* in problems of subject matter jurisdiction, have primarily been real estate cases. The later Supreme Court cases which follow *res adjudicata* and allow it to be set up as a barrier do not involve real estate. Moreover, they specifically indicate that the opinions in those cases were not intended to control real property situations. There was language to this effect in *Stoll* v. *Gottlieb*, and there was similar language in *United States* v. *United States Fidelity & Guaranty Company*, which limited the holding in the Chicot case.

There are many cases from this court which hold that the full faith and credit clause does not preclude collateral inquiry into subject matter jurisdiction. Many of these cases, in the words of Judge Blackmun, "Reveal particular fervor with respect to extraterritorial *in rem* judgment of State courts." This view is found in *Grover & Baker Sewing Machine Co.* v. *Radcliffe* and *William* v. *North Carolina*, which cases have previously been discussed, and *Carpenter* v. *Strange*, 141 U.S. 87; *Fall* v. *Easton*, 215 U.S. 1; *Olmstead* v. *Olmstead*, 216 U.S. 386; *Cook* v. *McGee*, 237 U.S. 611, and *Milwaukee County* v. *M. E. White Company*, 296 U.S. 268. These latter cases involve various factual situations, but all announce the rule that the courts of one State may not pass upon land titles to land lying in another State.

For instance, in *Fall* v. *Easton*, it is said:

> "No principle is better established than that the disposition of real estate whether by deed, descent or by any other mode must be governed by the law of the State where the land is situated."

There are other pronouncements from this court where the factual situations are entirely different, but where the court has gone out of its way to make pronouncements on this question. In *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L. ed. 565, the Court said:

> "• • • every State possesses exclusive jurisdiction and sovereignty over • • • property within its territory. • • • The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over • • • property without its territory. • • • 'Any exertion of authority of this sort beyond this limit,' says Story, 'is a mere nullity, and incapable of binding such • • • property in any other tribunals.' Story, Confl. Laws, Sec. 539."

A similar view is expressed in *Huntington* v. *Attrill*, 1892, 146 U.S. 657, 26 L. ed. 1123, 13 S. Ct. 224. It was there said:

> "Proceedings *in rem* to determine the title to land must necessarily be brought in the State within whose borders the land is situated, and whose courts and officers alone can put the party in possession."

From all of this it is readily apparent that there is a definite policy against allowing one state to pass upon real estate titles in another. When a State does take this action, the second State is not precluded from requestioning the matter either by full faith and credit or *res judicata*.

Petitioners assert that if the Blackmun opinion is affirmed it would settle nothing. That is not correct. According to *United States* v. *171.74 Acres of Land*, in a situation of this kind, the second adjudication is the binding adjudication in any further litigation. The same statement appears in sub-paragraph (e) of paragraph 10 of the Restatement of the Law, Judgments. Now let us see what that means in this case.

If the Blackmun opinion is affirmed this matter will go back to the District judge where it will be decided on its merits. If that judgment is not appealed it will be binding on both parties. If either party desires to appeal they can go directly to the Eighth Circuit and from there they will have an opportunity to return to this court.

Petitioners argue that if *res judicata* is not applied, there will be endless litigation and that endless litigation is not desirable. They argue there must be an end to litigation. What petitioners overlook is the question of whether it is more desirable to shorten litigation or to protect the rights of an individual. It would seem that courts everywhere have always made the rights of an individual paramount. In the early days in Missouri and before the Civil War, in litigation entitled *Charlotte* v. *Choteau*, 11 Mo. 193, 21 Mo. 590, 25 Mo. 465, 33 Mo. 194, the trial courts were willing to try the issues four times, and the Supreme Court was willing to hear it four times before Charlotte secured her personal right and was declared not to be a slave. There the rights of a poor, ignorant colored woman, born in slavery, were held far more important than the desire to terminate litigation. In innumerable cases this court has zealously protected the rights of an individual and required repeated trials of various issues in order that the individual might be fully protected.

Certainly in the instant case the rights of Julia Duke as an individual and the rights of the courts of the sovereign State of Missouri to determine for themselves the location of the land in controversy, is of far greater importance than to say this litigation should be terminated.

**Law School Articles.**

As to the Law School Articles, they are, of course, only the personal opinions of those writers. The Kansas Article

enunciates nothing new. It cites no cases involving titles to real estate which support the views of the writer. It overlooks the theory of States' rights and curtails the sovereignty of the individual States. The writer says at page 63 of petitioner's brief, that four of the five tests set out by the Restatement were against permitting collateral attack. Obviously the writer didn't study the record very good. He has overlooked that these five factors are simply five factors among others. He has overlooked the very pertinent statements of Judge Duncan indicating clearly that factor 1 did apply. He has further completely overlooked the basic principle announced by Story, reiterated in many decisions of this case, and a legal principle which has undoubtedly been controlling in this country for many years.

While the Pennsylvania article takes a little different viewpoint, it arrives at the same ultimate conclusion as the Kansas article but again after demonstrating a fatal lack of knowledge of the legal principles involved in the factual issues. It asserts that the court should first have looked to the law of Missouri to ascertain if that State would give effect to the Nebraska judgment without the compulsion of the full faith and credit clause. It admits there is no Missouri law on that question. Strangely enough, the article completely overlooks the fact that Nebraska completely failed to give full faith and credit to an Iowa judgment, even though the full faith and credit clause was in effect (*United States v. 171.74 Acres of Land*). Remember in that case the Nebraska court did inquire into the jurisdiction of the subject matter by the Iowa Court, and the subject matter was land.

This article again cites no cases involving jurisdiction of subject matter which is real estate. It says:

"No assertation was made that the Nebraska courts rendered an unfair judgment."

(Petitioners' brief, page 74). This statement, of course, is utterly absurd. The basic contention by Respondent is that the Nebraska judgment was completely unfair because it erroneously assumed jurisdiction of land to which it did not have jurisdiction. Further evidence that the judgment was unfair is borne out by the repeated statements of Judge Duncan to the effect that the land was always clearly Missouri land. Again, the article simply expresses the personal views of the author.

That the decision of the Nebraska Court was extremely unfair is abundantly indicated in the record. The original action in the District court in Nebraska involved not only the land in controversy here but land allegedly owned by Respondent's mother, Nellie Duke. Gene Durfee claimed all of that land (R. 9-10). The District court, in its opinion, without any explanation whatsoever, forgot the Nellie Duke land, but awarded the Julia Duke land to Gene Durfee. There is no possible explanation in the record of this action (R. 15-16).

When the Supreme Court of Nebraska affirmed this opinion, it also forgot the Nellie Duke land, but awarded the Julia Duke land to Durfee. How it arrived at its conclusion is impossible to understand. This opinion appears beginning at page 17 of the record.

It is thus quite apparent that the Nebraska Court arbitrarily cut the land in two and let Nellie Duke have part of it and gave the rest to Mr. Durfee. Absent an explanation for this action, and there is no such explanation, both judgments on their face are unfair and unwarranted. The writer of the Law Journal Article obviously had no understanding of the basic facts of the case when the article was written.

## CONCLUSION.

It is the position of the Respondent that the Blackmun opinion was a full, *legal* and accurate discussion of the legal principles involved in this matter and that his conclusions are accurately based on the law as it has been declared by this court. It is further submitted that the Blackmun opinion together with the briefs of Petitioners and some slight help from the Respondent, have covered practically all of the controlling decisions from this court. It is submitted that it is fundamental and has been fundamental since the founding of this government, that each sovereign state has the right and exclusive jurisdiction to determine for itself questions involving real estate lying within the confines of each individual State. Any different policy would lead to National chaos so far as the individual States are concerned.

We submit that Judge Blackmun correctly decided the issues of this matter, that Respondent is not bound by the decision of the Nebraska court, that neither full faith and credit nor *res adjudicata* apply in this matter and that the opinion in the Eighth Circuit Court of Appeals must be affirmed. For those reasons Respondent respectfully prays that the judgment of the Court of Appeals be affirmed in all respects.

Respectfully submitted,

R. A. BROWN,
212 1/2 North Sixth Street,
St. Joseph, Missouri,
JOHN H. WILTSE,
Falls City, Nebraska,
*Attorneys for Respondent.*

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 37

CIVIL.

GENE DURFEE AND LAURA DURFEE,
*Petitioners,*

vs.

JULIA E. DUKE,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## BRIEF OF AMICUS CURIAE STATE OF MISSOURI.

THOMAS F. EAGLETON,
Attorney General,
JOSEPH NESSENFELD,
Assistant Attorney General,
HOWARD L. McFADDEN,
Assistant Attorney General,
Supreme Court Building,
Jefferson City, Missouri,
*Attorneys for Amicus Curiae, State of Missouri.*

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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## BRIEF OF AMICUS CURIAE STATE OF MISSOURI.

## INTEREST OF AMICUS CURIAE STATE OF MISSOURI.

The interest of the State of Missouri is in maintaining inviolate the exclusive authority and jurisdiction of the courts of Missouri to adjudicate title to Missouri land.

Essentially, the question here involved is whether a judgment rendered by a Nebraska court can nullify, take away or limit the exclusive power of the courts of Missouri to adjudicate title to Missouri land. The District Court held that by litigating in Nebraska jurisdiction of the Nebraska courts to determine title to the land, the parties thereby deprived Missouri courts of any jurisdiction to determine the ownership of such land as between the parties even though, in fact, the land was in Missouri and beyond the authority of Nebraska to affect.

The Supreme Court of the State of Nebraska has determined unilaterally where the boundary lies between the two states; has decreed title to land in petitioners, who claim solely by virtue of a tax sale for nonpayment of Nebraska real property taxes upon land located on the Missouri side of the Missouri River; and has further decreed "that [respondent's] swamp land patent from the State of Missouri conveyed no title to her". *Durfee* v. *Keiffer*, 95 N.W.2d 618, l.c. 624.

The position of Missouri fundamentally is that Missouri land is exclusively subject to laws of Missouri and to the jurisdiction of its courts in the county wherein the land is situated, and that no judgment of any court of another state, no action or estoppel of private litigants can have the effect of compelling this state to surrender its sovereign rights in respect to lands therein and the exclusive authority of its courts to determine the title and ownership thereof and the validity of its swamp land patents.

The essential question involved in the action instituted in the Missouri circuit court (removed to the Federal District Court on diversity of citizenship grounds) was which of the parties has the better Missouri title to

Missouri land. Such a question by its very nature can be adjudicated only in the proper Missouri court. The only question which the Nebraska court could adjudicate in the action culminating in the judgment of its Supreme Court was which of the parties had the superior Nebraska title to land claimed to be in Nebraska.

It may well be true that as a prerequisite to the exercise of its jurisdiction to determine Nebraska title, the Nebraska court was required to determine the location of the land. However, this determination is of consequence only insofar as it vested jurisdiction in the Nebraska court to ascertain the superior Nebraska title. On the other hand, if Missouri has exclusive jurisdiction to determine Missouri title, it must be equally true that the Missouri courts likewise have full authority to determine the location of the land for the purpose of exercising such exclusive jurisdiction. *Res judicata* is a defense on the merits at best, and should not be held to operate to deprive the courts of another state of its sole jurisdiction over lands therein.

The authorities cited in the briefs of the parties to this case, and in the decision of the Court of Appeals, clearly demonstrate that the doctrine of *res judicata* is founded upon public policy. The Court of Appeals rightly held that where there is a superior public policy, *res judicata* is subservient thereto and may not be applied. There is a superior public policy in the instant case, namely a policy to maintain unimpaired the exclusive jurisdiction of the courts of Missouri to determine title to land therein.

It has been stated that Missouri as a state would not be bound by the results of the litigation in the Nebraska courts to which it was not a party. While that may be literally true, insofar as the ultimate determination of

the state's boundaries are concerned, the recognition of the Nebraska judgment as urged by appellants, and by the District Court in holding it was deprived of jurisdiction thereby, necessarily results in binding Missouri and its courts. The District Court held that it was deprived of jurisdiction to determine Missouri title solely because of the Nebraska litigation. If that ruling should be sustained, it means that the litigation between private parties does in fact bind Missouri.

Moreover, even if, in subsequent litigation between the states themselves, this Court should, by its determination of the boundaries between the states, determine that the land is in truth in Missouri, Missouri would then be compelled to recognize not the superior Missouri title but the Nebraska title founded upon a tax deed resulting from nonpayment of Nebraska taxes on Missouri land! To say that only the parties are bound, in this situation, ignores reality and begs the question. Respondent derived her Missouri title from the grant of the Missouri swamp land patent. No party other than the parties to this litigation or their privies can now claim title to the land. Hence, if compelled to recognize the Nebraska judgment as a valid determination of title to Missouri land, Missouri itself would necessarily be bound thereby and as a result compelled to concede that the courts of Nebraska have the unilateral power to deprive the courts of Missouri of their exclusive authority to determine title to Missouri land.

In this brief, we will discuss the public policy of the State of Missouri with respect to title of lands, and show that such policy is of such an overriding nature as to prevent the application of the doctrine of *res judicata* to the instant situation, and also show that full faith and credit, in the sense in which petitioners seek to apply it, should not be given to the Nebraska judgment. It may well be

that a decision in both states would result in conflicting determinations respecting the ownership of the land. However, once it is understood that Nebraska's judgment determined only the superior Nebraska title and that a Missouri judgment could determine only the superior Missouri title, there could, in truth, be no conflict in the absolute sense. Once this Court determines the boundary, it will then at once be seen which of the two judgments is of value to the prevailing party.

## ARGUMENT.

### Full Faith and Credit.

The District Court did not base its decision on full faith and credit. The Court of Appeals correctly ruled that the full faith and credit clause does not require Missouri to accept the judgment of the Nebraska court as a conclusive adjudication of title to Missouri land. Every judgment depends upon the power of the Court to render it. The District Court found, as is the fact, that the land in question is Missouri land. Nebraska courts are therefore wholly devoid of any power whatsoever to adjudicate the title thereto. It matters not that the parties may have litigated the question in Nebraska. The want of authority to enter the judgment is not thereby affected.

Land is unlike status, in that it necessarily is local and fixed. It is a special kind of subject-matter, jurisdiction over which can never be conferred by the parties contrary to the policy of the State wherein it is located. Hence, the determination of one state that it has jurisdiction over land which, in fact, is located in a sister state cannot operate to validate its judgment or deprive the sister state of its exclusive authority to determine title to such land.

Missouri alone has the power to adjudge title to land within its boundaries. As a necessary corollary to the proposition, it follows that any judgment of another state adjudging title to such land is void for want of jurisdiction, and Missouri is not compelled to recognize the Nebraska judgment to the extent it is sought thereby to adjudge such title. *Fall* v. *Eastin*, 215 U.S. 1; *Carpenter* v. *Strange*, 141 U.S. 87, 106.

The suggestion has been made that the Nebraska judgment would be conclusive and not subject to collateral attack in Nebraska courts. If true, this is beside the point. The Nebraska judgment purported to declare the state of the Nebraska title. Whatever that title may be worth, it may be conceded that petitioners have the superior Nebraska title, and that the judgment of the Nebraska court to such effect is conclusive. But since the instant case is not concerned with the Nebraska title at all, that judgment would not—and could not—be conclusive, in Nebraska or elsewhere, as to which party has the superior Missouri title to Missouri land. Hence, if the Nebraska court by its judgment purported to declare the Missouri title, it would be wholly without jurisdiction so to do; and if its judgment be construed to declare Missouri title, it need not be accorded full faith and credit in the courts of the state wherein the land is in fact located.

Missouri further submits that the Supreme Court of the State of Nebraska, upon the face of its judgment (*Durfee* v. *Keiffer*, 95 N.W.2d 618, 624), itself rejected the requirement of full faith and credit when it failed to give force and effect to the public act of the County Court of Holt County, Missouri, in granting to respondent her swamp land patent. A party claiming by virtue of that judgment should not, therefore, be permitted to apply a double standard.

The decisions of this Court in the twin cases of *Arkansas* v. *Tennessee*, 246 U.S. 158, 62 L. ed. 638, and *Cissna* v. *Tennessee*, 246 U.S. 289, 62 L. ed. 720, are controlling and afford an additional reason why full faith and credit should not be accorded the Nebraska judgment. Where any decision of a state court is sought to be applied for the purpose of establishing the location of a water course boundary between two states it has no force and effect. That power resides in this Court alone (*Missouri* v. *Nebraska*, 196 U.S. 23, 49 L. ed. 372).

Hence, because the decision of the Supreme Court of Nebraska at issue does, in effect, purport to adjudicate the location of the boundary between the states and because jurisdiction of that question remains in this Court by way of an original action between the states, the judgment of Nebraska's Supreme Court cannot be of a type entitled to full faith and credit and Missouri should not be required to give force and effect to it in its courts.

This Court, in *Arkansas* v. *Tennessee* and *Cissna* v. *Tennessee*, *supra*, has already repudiated the notion that Nebraska may, as is suggested in its *amicus* brief herein (p. 4), "lift itself by its own bootstraps." If this were so, utter chaos would result. Surely, the full faith and credit portion of the Constitution of the United States cannot be applied to accomplish the same end.

**Res Judicata.**

The United States District Court for the Western District of Missouri, upon removal of the instant proceeding to it, sat as a court of the state of Missouri to try title to Missouri land. This is true with reference to the questions at issue here as established in the majority, as well as the minority, opinions in *Angel* v. *Bullington*,

(1947) 330 U.S. 183, 91 L. ed. 832. See also *Erie Railroad* v. *Tompkins*, (1938) 304 U.S. 64, 82 L. ed. 1188, 1195; *Ruhlin* v. *New York Life Insurance Company*, (1938) 304 U.S. 202, 82 L. ed. 1290, 1293. Therefore, when the United States District Court for the Western District of Missouri undertook to apply the doctrine of *res judicata* to this case, it was bound to apply it as the Missouri courts would have applied it when it found, as a matter of fact, that the land in question was in Holt County, Missouri, and not in Richardson County, Nebraska. In truth, the District Court gave no consideration at all to the basic policy of Missouri.

With reference to title to Missouri land, we need not resort to generalizations upon the subject of *res judicata* because Missouri's public policy in this respect is declared by statute and many court decisions.

The question dissolves immediately by reference to one of the more recent decisions of the Supreme Court of Missouri upon the subject. *March* v. *Gerstenschlager*, (Mo. 1959) 322 S.W.2d 743, 744.

"* * * This suit was filed in the Circuit Court of the City of St. Louis and all proceedings were had there. The real estate is in St. Francois County.

"We are confronted immediately with a question of jurisdiction, although the parties have not raised it. Section 508.030 [RSMo. 1959] is as follows: 'Suits for the possession of real estate, or whereby the title thereto may be affected, or for the enforcement of the lien of any special tax bill thereon, shall be brought in the county where such real estate, or some part thereof, is situated.' It has been held that the provisions of this section are mandatory and that its provisions cannot be waived." (Citing prior Missouri cases.)

The case went on to hold that because the proceeding there was instituted in a county other than one where the land was located the judgment affecting the title was void even though all parties thereto deliberately sought the jurisdiction of the court rendering the judgment and had not raised the question on appeal.

In *Howell* v. *Reynolds*, (Mo. 1952) 249 S.W.2d 381, 384, the Supreme Court of Missouri stated:

> "The decree expressly determined an issue affecting title to real estate. Therefore, even though the judgment of the trial court was void, nevertheless jurisdiction of the appeal lies in this court. In the case of Watts v. Watts, 304 Mo. 361, 365, 263 S.W. 421, 422, an analogous situation was under consideration, and this court there said: 'It is claimed that, because the judgment attempting to divest the title to the real estate is void, this court is without jurisdiction of the appeal. The title to real estate is directly affected by the judgment so as to give this court jurisdiction, although the judgment is void on its face. This is the court to determine the question whether the judgment, which in form transfers property from one party to another, has that effect.'"

The only possible remedy with reference to the trial of title to the land in question, in a court having jurisdiction over the land, would, of necessity, involve collateral attack upon the prior final judgments of the Nebraska courts if they be construed to adjudicate the superior Missouri title. Because the judgments of those courts are void according to the law and decisions of the Supreme Court of Missouri (if the land does in fact lie within the State of Missouri), then the courts of Missouri not only are not bound by the doctrine of *res judicata* to give effect to the judgments of the courts of Nebraska pertaining thereto, but also are prohibited from doing so.

When the Supreme Court of the State of Missouri says that a judgment affecting title to Missouri land rendered by a court not sitting in the county where the land is located is void, it means that such judgment is as if never rendered and such a judgment, being no judgment at all, may not be considered or applied under the doctrine of *res judicata*.

> "As to res judicata, which was relied on by the trial court, a void judgment may not be used as the basis for the application of that Doctrine." *Berry* v. *Chitwood*, (Mo. 1962) 362 S.W.2d 515, 517.

In *Ripley* v. *Bank of Skidmore*, (Mo. 1947) 198 S.W.2d 861, l.c. 864, the Supreme Court of Missouri collected what it deemed to be the authorities upon the subject and stated the law of the state with respect to void judgments and *res judicata*:

> "It [the judgment] was not merely erroneous or irregular, it was void ab initio. Certainly a void judgment may not be held to be evidence of probable cause. 'No conclusive effect can be given to a judgment which is absolutely void * * *.' 34 C.J., Judgments, Section 1310. Nor does a void judgment have any effect as an estoppel. 34 C.J., Judgments, Section 1183.
>
> 'All proceedings founded on a void judgment are themselves regarded as invalid.' 31 Am. Jur., Judgments, Section 430, quoted in Re Main's Estate, 236 Mo. App. 88, 152 S.W.2d 696."

The same principle has been stated in a number of other cases in Missouri. See *MacIntosh* v. *Wiggins*, (Mo. 1947) 204 S.W.2d 770, and cases cited.

Therefore, when the United States District Court for the Western District of Missouri found that the land in

question was, in fact, in Missouri, its duty was to proceed to exercise jurisdiction to determine the Missouri title and consider the merits according to Missouri law. In so doing it should have, of necessity, rejected the Nebraska judgment insofar as it may be deemed to adjudge the Missouri title. When it failed to do so it erred according to *Angel* v. *Bullington*, *Erie Railroad Co.* v. *Tompkins* and *Ruhlin* v. *N. Y. Life Ins. Co.*, *supra*. Thus, the United States Court of Appeals for the Eighth Circuit properly reversed and remanded, and its order should be affirmed.

## CONCLUSION.

The Full Faith and Credit Clause of the United States Constitution does not require the State of Missouri or its courts to recognize an adjudication by the courts of a sister state declaring land which, as a matter of fact, falls within the boundary of the State of Missouri to be a part of the sister state and adjudging title thereto.

The doctrine of *res judicata* should not be employed to deprive the courts of Missouri of their exclusive power to try title to Missouri land.

Respectfully submitted,

THOMAS F. EAGLETON,
Attorney General,
JOSEPH NESSENFELD,
Assistant Attorney General,
HOWARD L. McFADDEN,
Assistant Attorney General,
Supreme Court Building,
Jefferson City, Missouri,
*Attorneys for Amicus Curiae,*
*State of Missouri.*

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*Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

## REPLY BRIEF OF PETITIONERS

HAROLD W. KAUFFMAN,
730 Farm Credit Building
Omaha 2, Nebraska

ALFRED A. FIEDLER,
300 Keeline Building
Omaha 2, Nebraska

AUGUST ROSS,
1405 City National Bank Building
Omaha 2, Nebraska

*Attorneys for Petitioners.*

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## REPLY BRIEF OF PETITIONERS

## ARGUMENT

### Introduction

The parties hereto and amici curiae have presented their respective positions at some length. Further extensive argument would necessarily be repetitious and would add little, if anything, to what has previously been said. So far as the applicable law is concerned, we are content to rest our case on those principles and authorities that

we have previously reviewed. We do desire to call attention to a few matters in connection with the respondent's brief and to that filed by the State of Missouri. With this thought in mind, we present this very short reply brief.

**Comments on Respondent's Brief**

The respondent's principal brief adds nothing of substance to what was said in her brief resisting certiorari. The Court will note that the principal authority relied upon by the respondent is the opinion of the Court of Appeals. Thus, respondent's brief contains no less than twenty references to "Judge Blackmun" (referring, of course, to Honorable Harry A. Blackmun, the author of the opinion of the Court of Appeals herein) and six additional references to the "Blackmun Opinion". We respectfully submit that in this instance the Court of Appeals erred and that neither its reasoning nor its conclusion, though reiterated time and time again, can logically be sustained.

Strangely enough, respondent relies heavily upon *United States v. 171.74 acres of land, etc.*, D. C. Neb., 1962, 206 F. Supp. 322 (Affirmed in *Schroeder v. 171.74 acres of land more or less*, 1963, 318 F. 2d 311). That case merely applied the doctrine of *Treinies v. Sunshine Mining Co.*, 1939, 308 U. S. 66, 84 L. ed. 85, 60 S. Ct. 44, and held that the Nebraska court's determination on the question of subject matter jurisdiction in the former case was res judicata, despite that court's claimed error in failing to give full faith and credit to a prior Iowa judgment. See petitioners' principal brief, pages 35, 36. We respectfully submit that the Court of Appeals reached the correct result in the Schroeder case although its attempt to dis-

tinguish the decision now under review (which was relied upon by the appellants in Schroeder) does not appear to be sound. See 318 F. 2d at pages 315, 316.

On page 22 of respondent's brief it is asserted that notwithstanding the fact that the Court of Appeals held to the contrary, lack of the Nebraska Court's jurisdiction over the subject matter was clear, and the respondent relies upon the dictum in the memorandum opinion of Judge Duncan herein, that in his opinion the Nebraska Court incorrectly determined the fact issues concerning the location of the land in question. Petitioners' discussion of this issue is attacked by respondent on the ground that it "ridicules the proposition". Petitioners had no such intention. We do insist, however, that alleged lack of subject matter jurisdiction is not disclosed in this record and we reiterate, any lack of jurisdiction would necessarily be based upon an *independent determination* of fact that the Missouri River changed its course as a result of accretion instead of avulsion as determined in the Nebraska action.

On the top of page 25 of respondent's brief appears this paragraph:

> "If the Blackmun opinion is affirmed, this matter will go back to the District judge where it will be decided on its merits. If that judgment is not appealed it will be binding on both parties. If either party desires to appeal they can go directly to the Eighth Circuit and from there they will have an opportunity to return to this court."

May we respectfully suggest to respondent that she had the opportunity to seek review of this Court following the Nebraska Supreme Court's decision. That was the

time for Supreme Court review of the facts of the case if the Nebraska decision disclosed arbitrary or unreasonable action, an assumption of jurisdiction where none existed, or a taking of property without due process of law. The respondent, having failed to pursue her remedy in this regard, should not be permitted to escape the finality of the Nebraska Court's factual determination, obtain a contrary fact finding, and shift the burden to petitioners to "return to this Court". In other words what respondent now proposes as a remedy for the losing claimant if the facts are again examined by another tribunal is the very remedy respondent herself had after the decision of the Nebraska Supreme Court and did not choose to follow.

On page 27 of the respondent's brief, the Nebraska Court's decision is referred to as being "completely unfair". What we have said in the immediately preceding paragraph amply answers this contention. However, we would point out also that the plain fact is there is no question in this case involving the fairness of the Nebraska decisions. The questions presented for review herein are found on pages 3-5 of petitioners' brief and the respondent has disclosed no dissatisfaction with them as she could have done under Rule 40(3) of this Court, if she had been so inclined.

As previously stated, we do not deem it necessary to review again the authorities on which we rely. As to some of the cases cited previously by the parties, our construction of the decisions differs from the construction placed on them by respondent. It is for this court to determine which construction is warranted and we shall not burden the court with further argument in that regard.

## Comments on Missouri's Brief

The brief amicus curiae, filed by the Attorney General of Missouri, and all eleven pages of it, is based upon an entirely false postulate, just as are many of the arguments advanced by respondent herein. The first two sentences of Missouri's brief serve, rather well, to disclose the entire position of the Attorney General of Missouri. Thus it is said:

> "The interest of the State of Missouri is in maintaining inviolate the exclusive authority and jurisdiction of the courts of Missouri to adjudicate title to Missouri land. Essentially, the question here involved is whether a judgment rendered by a Nebraska court can nullify, take away, or limit the exclusive power of the courts of Missouri to adjudicate title to Missouri land."

Thus Missouri's Attorney General takes the position that there is no question concerning the location of the land and he starts his brief, continues it, and finishes it, with that same false hypothesis. On occasions he seems to feel that there could be two titles to the land as between these private litigants, one a Missouri title and the other a Nebraska title. See, for example, bottom of page 2 and top of page 3 of Missouri's brief.

It scarcely needs to be said again that the very crux of this case was whether the land was located in Missouri or Nebraska and that depended solely on the fact question whether the Missouri River changed its course as a result of avulsion of accretion. It was determined in the Nebraska litigation that the change in course resulted from avulsion and that decision is binding between the parties to this suit.

On page 4 of the brief of the Attorney General of Missouri the statement is made that if in subsequent litigation between the states themselves, this Court should, by its determination of the boundaries between them, determine that the land is in truth in Missouri, Missouri would be compelled to recognize not the superior Missouri title but the Nebraska title founded upon a tax deed resulting from non-payment of Nebraska taxes on Missouri land. We do not know exactly what the Attorney General has in mind by this statement but it is clear that as respects Missouri tax laws or any other laws affecting the state itself, a determination by this Court of the boundary lines in an appropriate suit between the states would be conclusive. As far as the private litigants in this action are concerned the *title* to the land would not shift either way as a result of subsequent litigation (or for that matter compact) between Missouri and Nebraska.

At the top of page 5 of Missouri's brief it is again suggested that the Nebraska judgment could determine the Nebraska title and a subsequent Missouri judgment could determine the Missouri title to the land and thereby there would be no conflict. The Attorney General then suggests that if sometime in the future this Court determines the boundary it would then be determined which of the two judgments, that is Nebraska's judgment or Missouri's judgment is to be of value to the prevailing party. Such a suggestion merits slight discussion. In the parlance of the pavement it simply doesn't "make sense".

Again on pages 6 and 7, and in fact throughout Missouri's brief, the Attorney General speaks of Nebraska's title and Missouri's title and seems to feel that each state

has authority to adjudicate title to this land for "whatever that title may be worth" and that neither state should be required to give full faith and credit to the judgment of the other state adjudicating the title. This it would appear is a new concept in the law of titles. It is likewise a new concept in conflict of laws, res judicata, and full faith and credit.

The Attorney General of Missouri wholly fails to distinguish between states' rights and rights of private litigants within the states. It may well be that Missouri and Nebraska will one day settle their differences concerning boundary lines which may affect this land as well as hundreds of acres of other land similarly located along the border. Or it may be that eventually a suit will be brought by Missouri or Nebraska in this Court and this Court will make the determination of boundary. In neither event, however, will the title as between these private litigants, petitioners and respondent herein, be in the least affected. Title to this land has been established in the Durfees and that adjudication of title should not be disturbed.

On page 7 of Missouri's brief, it is suggested that the decision of the Supreme Court of Nebraska in effect purports to adjudicate the location of the boundary between the states. That simply is not true and we dare say that neither Nebraska nor Missouri would attempt to establish their boundary in a proceeding between private litigants who are each claiming title to land in dispute.

The Missouri Attorney General assumes that the Nebraska judgment purports to adjudicate a Missouri title. See *amicus curiae* brief of Missouri, page 11. Here again the Attorney General falls into the error of failure to

differentiate between private litigation between private individuals and litigation between sovereign states of the United States. Nebraska did not attempt to adjudicate Missouri title. The Nebraska Courts simply found that title to the land was in the Durfees and not in the respondent.

We would call attention to the fact that the position taken in Missouri's brief is in a sense flatly in conflict with that of the respondent whose contention the Attorney General seeks to sustain. Respondent contends that this litigation can be terminated promptly even if a decision is favorable to respondent. In other words, respondent argues that if this case is remanded to the Court of Appeals and to the District Court for a new trial, the District Court's decision would be res judicata. Missouri's Attorney General does not so contend. He merely says that there can be a Missouri title and a Nebraska title and that eventually it may be determined which title is of any benefit to the holder thereof. Under the theory of the Missouri Attorney General there would never be any finality to a judgment between these litigants until a subsequent action is brought between Nebraska and Missouri or until Nebraska and Missouri settle any boundary dispute they may have.

## CONCLUSION

A few days following the oral argument herein, seven years will have elapsed since Gene and Laura Durfee filed their quiet title action in the District Court of Richardson County, Nebraska. Petitioners respectfully submit that the time is ripe for final adjudication of this controversy.

Counsel for respondent suggests that the rights of respondent as an individual and the rights of the Courts of Missouri to determine for themselves the location of the land in controversy is of far greater importance than termination of this litigation. We suggest that the rights of the petitioners are likewise to be considered and that they are entitled to be spared the expense of further protracted litigation.

The respondent has had her day in court and more. She is not entitled to further prolong this litigation. So far as Missouri is concerned, that state's rights are neither jeopardized nor in any way affected by this litigation. We dare say that both Nebraska and Missouri should welcome a decision that will give to the judgments of their highest courts the dignity and the full faith and credit to which they are entitled.

We respectfully submit that under the doctrines of res judicata and full faith and credit the judgment of the Court of Appeals is due for reversal and we renew the prayer of our principal brief.

Respectfully submitted,

HAROLD W. KAUFFMAN,

730 Farm Credit Building
Omaha 2, Nebraska

ALFRED A. FIEDLER,

300 Keeline Building
Omaha 2, Nebraska

AUGUST ROSS,

1405 City National Bank Building
Omaha 2, Nebraska

*Attorneys for Petitioners.*